



**DEPARTMENT OF LABOR**

**Office of Federal Contract Compliance Programs**

**41 CFR Part 60-741**

**RIN 1250-AA02**

**Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities**

**AGENCY:** Office of Federal Contract Compliance Programs, Labor.

**ACTION:** Final rule.

**SUMMARY:** The Office of Federal Contract Compliance Programs (OFCCP) is publishing revisions to the current regulations implementing the non-discrimination and affirmative action regulations of section 503 of the Rehabilitation Act of 1973, as amended. Section 503 prohibits discrimination by covered Federal contractors and subcontractors against individuals on the basis of disability, and requires affirmative action on behalf of qualified individuals with disabilities.

The final rule adopts several key revisions proposed in the notice of proposed rulemaking. The final rule strengthens the affirmative action provisions by, among other things, requiring data collection pertaining to applicants and hires with disabilities, and establishing a utilization goal for individuals with disabilities to assist in measuring the effectiveness of the contractor's affirmative action efforts. However, some of the NPRM's proposals, particularly with regard to the creation and maintenance of certain records and the conduct of certain affirmative action obligations, have been eliminated or made more flexible in order to reduce the compliance burden on contractors. To implement changes necessitated by the passage of the ADA Amendments Act (ADAAA) of 2008, the final rule also adopts revisions to the definitions and to the nondiscrimination provisions of the implementing regulations. The specific revisions made, and the rationale for making them, are set forth in the Section-by-Section Analysis below.

**DATES:** Effective Date: These regulations are effective [INSERT DATE 180 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Debra A. Carr, Director, Division of Policy, Planning and Program Development, Office of Federal Contract Compliance Programs, at 200 Constitution Avenue, N.W., Room C-3325, Washington, D.C. 20210, or call (202) 693-0104 (voice) or (202) 693-1337(TTY). Copies of this rule in alternative formats may be obtained by calling (202) 693-0103 (voice) or (202) 693-1337 (TTY). The alternative formats available are large print and electronic file on computer disk.

The rule also is available on the Internet on the Regulations.gov website at <http://www.regulations.gov> or on the OFCCP website at <http://www.dol.gov/ofccp>.

## **SUPPLEMENTARY INFORMATION:**

### **Executive Summary**

The Office of Federal Contract Compliance Programs (OFCCP) is a civil rights, worker protection agency which enforces one Executive Order and two laws that prohibit employment discrimination and require affirmative action by companies doing business with the Federal Government.<sup>1</sup> Specifically, Federal contractors must engage in affirmative action and provide equal employment opportunity without regard to race, color, religion, sex, national origin, disability, or status as a protected veteran. Executive Order 11246, as amended, prohibits employment discrimination on the basis of race, religion, color, national origin, and sex. The Vietnam Era Veterans' Readjustment Assistance Act of 1974 (VEVRAA), as amended, prohibits employment discrimination against certain protected veterans. Section 503 of the Rehabilitation Act of 1973 (section 503), as amended, prohibits employment discrimination against individuals with disabilities.

OFCCP evaluates the employment practices of over 4,000 Federal contractors and subcontractors annually and investigates individual complaints. OFCCP also engages in outreach to employees of Federal contractors to educate them about their rights, and provides technical assistance to contractors on their nondiscrimination and affirmative

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<sup>1</sup> Executive Order 11246, as amended; Section 503 of the Rehabilitation Act of 1973, as amended, (section 503), and the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended, 38 U.S.C. 4212 (VEVRAA).

action obligations. We estimate that our jurisdiction covers approximately 200,000 Federal contractor establishments, and more than 45,000 parent companies.<sup>2</sup>

Employment discrimination and underutilization of qualified workers, such as individuals with disabilities and veterans, contribute to broader societal problems such as income inequality and poverty. The median household income for “householders” with a disability, aged 18 to 64, was \$25,420 compared with a median income of \$59,411 for households with a householder who did not report a disability.<sup>3</sup> Controlling for age and race we find that workers with a disability, on average, earn less than private sector workers without a disability. The mean hourly wage of those with a disability is \$17.62 (with a median of \$13.73) compared to \$21.67 (median \$16.99) for those without a disability.<sup>4</sup> Controlling for age and race, male workers with a disability earn 23 percent less than males without a disability. The disability gap for females is 20 percent.<sup>5</sup> While 28.8 percent of individuals, ages 18 to 64, with a disability were in poverty in 2011, the data show that 12.5 percent of those individuals without a disability were in poverty.<sup>6</sup>

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<sup>2</sup> This establishment estimate is based on a review of FY 2009 EEO-1 contractor establishment data and other contractor databases, including the Federal Procurement Data System (FPDS). Based on EEO-1 data, we determined that the ratio of parent companies to the number of establishments is approximately four establishments per parent company.

<sup>3</sup> Income, Poverty and Health Insurance Coverage in the United States: 2011, Current Population Reports, issued September 2012, <http://www.census.gov/prod/2012pubs/p60-243.pdf> (last accessed July 8, 2013), p. 10. A “householder” is the person (or one of the people) in whose name the home is owned or rented and the person to whom the relationship of other household members is recorded. Typically, it is the head of a household. Only one person per household is designated the “householder.”

<sup>4</sup> OFCCP ran wage regressions using the natural log of effective hourly wages calculated as real income divided by usual hours per week and weeks per year. The weeks per year variable is categorical so the midpoint of each category was used as a proxy for the number of weeks worked. Explanatory variables include age and race. The sample was restricted to individuals aged 18 to 64 employed in the private sector. Individuals currently in the armed forces were not included in the sample. All OFCCP models used ACS 2008-2010 Public Use Microdata (PUMS).

<sup>5</sup> Id.

<sup>6</sup> Income, Poverty and Health Insurance Coverage in the United States: 2011, Current Population Reports,

Based on our analysis of the American Community Survey (ACS) 2008-2010 Public Use Microdata (PUMS), and controlling for age and race we found that:<sup>7</sup>

- Males with disability had a 7.2 percentage point higher unemployment rate than males without a disability.
- Females with disability had a 6.5 percentage point higher unemployment rate than females without a disability.
- Females with a disability had a 29.2 percentage point higher probability of not being in the labor force than females without a disability.

A 2009 report found that “having a disability is associated with lower earnings due to decreased ability to work, prejudice, and other factors.”<sup>8</sup> There are a number of hypotheses concerning disparities in labor force participation, employment rates, and wages. While knowledge of opportunities, differences in access and attainment of training and education, and underutilization of individuals with disabilities likely contribute to these disparities, the culture of the typical workplace and discrimination are also factors in some employment settings. However, there is little empirical data upon which to base targeted interventions. Data collection remains a critical need.

The final rule is intended to provide contractors with the tools needed to evaluate

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issued September 2012, <http://www.census.gov/prod/2012pubs/p60-243.pdf> (last accessed July 8, 2013)

<sup>7</sup> OFCCP ran wage regressions using the natural log of effective hourly wages calculated as real income divided by usual hours per week and weeks per year. The weeks per year variable is categorical so the midpoint of each category was used as a proxy for the number of weeks worked. Explanatory variables include age and race. The sample was limited to individuals aged 18 to 64 employed in the private sector. All OFCCP models used ACS 2008-2010 Public Use Microdata (PUMS).

<sup>8</sup> Changing Demographic Trends that Affect the Workplace and Implications for People with Disabilities, Executive Summary (Nov. 30, 2009), p. 4. “Studies agree that disability incidence is related to income and earnings. A number of intertwined relationships, however, make it somewhat difficult to sort out cause and effect.”

their own compliance and proactively identify and correct any deficiencies in their employment practices. Because the existing regulations implementing section 503 do not provide contractors with adequate tools to assess whether they are complying with their nondiscrimination and affirmative action obligations to recruit and employ qualified individuals with disabilities, the revisions of the final rule will assist contractors in averting potentially expensive violation findings by OFCCP.

#### I. Statement of Legal Authority

Enacted in 1973, the purpose of section 503 of the Rehabilitation Act, as amended, is twofold. First, section 503 prohibits employment discrimination on the basis of disability by Federal Government contractors and subcontractors. Second, it requires each covered Federal Government contractor and subcontractor to take affirmative action to employ and advance in employment qualified individuals with disabilities.

The nondiscrimination and general affirmative action requirements of section 503 apply to all Government contractors with contracts or subcontracts in excess of \$10,000 for the purchase, sale, or use of personal property or nonpersonal services (including construction). See 41 CFR 60-741.4. The requirement to prepare and maintain an affirmative action program, the specific obligations of which are described at 41 CFR 60-741.44, apply to those contractors that have a contract or subcontract of \$50,000 or more and 50 or more employees.

In the section 503 context, receipt of a Federal contract comes with a number of responsibilities, including compliance with the section 503 nondiscrimination and anti-retaliation provisions, meaningful and effective efforts to recruit and employ individuals with disabilities, creation and enforcement of personnel policies that support the

contractor's affirmative action efforts, maintenance of accurate records on its affirmative action efforts, and OFCCP access to these records upon request. Failure to abide by these responsibilities may result in various sanctions, including withholding of progress payments, termination of contracts, and debarment from receiving future contracts.

## II. Major Provisions

The following major provisions in the Final Rule would:

- Establish, for the first time, a 7 percent workforce utilization goal for individuals with disabilities. This goal is not a quota or a ceiling that limits or restricts the employment of individuals with disabilities. Instead, the goal is a management tool that informs decision-making and provides real accountability. Failing to meet the disability utilization goal, alone, is not a violation of the regulation and it will not lead to a fine, penalty, or sanction. OFCCP is mindful that smaller contractors may find it more difficult to attain the goal in each of their job groups. Therefore, the final rule permits contractors with a total workforce of 100 or fewer employees to apply the 7 percent goal to their entire workforce, rather than to each job group.
- Require contractors to invite applicants to voluntarily self-identify as an individual with a disability at the pre-offer stage of the hiring process, in addition to the existing requirement that contractors invite applicants to voluntarily self-identify after receiving a job offer. The purpose of this data collection is to provide contractors with useful information about the extent to which their outreach and recruitment efforts are effectively reaching people with disabilities.
- Require contractors to invite incumbent employees to voluntarily self-identify on a regular basis. The status of employees may change and a regular invitation to self-

identify provides employees a way to self-identify for the first time, or to change their previously reported status. Providing a regular invitation should contribute to increased self-identification rates. Improving data collection is important to assessing employment practices.

- Require contractors to maintain several quantitative measurements and comparisons for the number of individuals with disabilities who apply for jobs and the number of individuals with disabilities they hire in order to create greater accountability for employment decisions and practices. Having this data will enable contractors and OFCCP to evaluate the effectiveness of contractors' outreach and recruitment efforts, and examine hiring and selection processes related to individuals with disabilities.
- Require prime contractors to include specific, mandated language in their subcontracts in order to provide knowledge and increase compliance by alerting subcontractors to their responsibilities as Federal contractors.
- Implement changes necessitated by the passage of the ADA Amendments Act (ADAAA) of 2008 by revising the definition of "disability" and certain nondiscrimination provisions of the implementing regulations.

### III. Cost and Benefits

This is an economically significant and major rule. Individuals with disabilities make up 4.83 percent of the employed.<sup>9</sup> The section 503 rule establishes a utilization goal for employing individuals with disabilities of 7 percent. To meet the goal, OFCCP estimates that Federal contractors would hire an additional 594,580 individuals with

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<sup>9</sup> U.S. Census Bureau, 2011 American Community Survey. There are a variety of sources for this estimate. The Current Population Survey estimates a lower rate, 3.5 percent, and the Survey of Income and Program Participation estimates 9.4 percent.



disabilities. There are tangible and intangible benefits from investing in the recruitment and hiring of individuals with disabilities. Among them are employer tax credits, access to a broader talent pool, an expanded pool of job applicants, access to new markets by developing a workforce that mirrors the general customer base, lower turnover based on increased employee loyalty, and lower training costs resulting from lower staff turnover.<sup>10</sup> According to the U.S. Business Leadership Network (USBLN), “corporate CEOs understand that it’s cost effective to recruit and retain the best talent regardless of disability.”<sup>11</sup> Broad public policy considerations also exist related to the decreased demand for and cost of social services as more people move into jobs and pay taxes.

These projected hires, some of whom will require reasonable accommodation, will not add significant costs for the employers. The requirement to provide reasonable accommodation exists under the ADA, and now exists under the ADA Amendments Act for employers. This is not a new obligation created by this rule. According to a study conducted by the Job Accommodation Network (JAN), of the employers who gave the researchers cost information related to accommodations they had provided, 57 percent said the accommodations needed by employees cost absolutely nothing.<sup>12</sup> For 43 percent of employers, the typical one-time expenditure by employers to provide a

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<sup>10</sup> Job Accommodation Network, “Workplace Accommodations: Low Cost, High Impact,” Sept. 1, 2012. Accommodation and Compliance Series, <http://askjan.org/media/lowcosthighimpact.html> (last accessed Aug. 9, 2013).

<sup>11</sup> USBLN Disability at Work, and U.S. Chamber of Commerce, “Leading Practices on Disability Inclusion,” [http://www.usbln.org/pdf-docs/Leading\\_Practices\\_on\\_Disability\\_Inclusion.pdf](http://www.usbln.org/pdf-docs/Leading_Practices_on_Disability_Inclusion.pdf) (last accessed Aug. 9, 2013). The USBLN and Chamber report shares best practices from larger corporations for hiring and providing reasonable accommodations.

<sup>12</sup> Job Accommodation Network, “Workplace Accommodations: Low Cost, High Impact,” Sept. 1, 2012. Accommodation and Compliance Series, <http://askjan.org/media/lowcosthighimpact.html> (last accessed Aug. 9, 2013), p.3; “Fast Facts: Reasonable Accommodations & The Americans with Disabilities Act,” U.S. Chamber of Commerce & the Virginia Commonwealth University, Rehabilitation Research and Training Center on Workplace Supports, <http://www.worksupport.com/Topics/downloads/rrtcfactsheet2.pdf>.

reasonable accommodation was \$500. Finally, 2 percent reported that accommodations required a combination of one-time and annual costs.

In projecting the overall increase in Federal contractor employment of protected veterans under the VEVRAA rule and individuals with disabilities under the section 503 rule, there is likely to be an interaction between the two categories. Some of the newly hired individuals with disabilities will likely be protected veterans. There are 5.78 million people 18 years or older in the labor force with a disability, 822,000, or 14.21 percent, of whom are veterans.<sup>13</sup>

To meet the section 503 rule's utilization goal of 7 percent, Federal contractors would have to hire an additional 594,580 individuals with disabilities. Assuming that the number of disabled veterans hired will be proportional to their share of the disabled labor force, then we estimate that 84,490 of the newly hired individuals with disabilities will also be protected veterans.<sup>14</sup> Subtracting 84,490 protected veterans from the target of 205,500 leaves 121,010 non-disabled veterans needed to meet the hiring goal. Viewed independently, Federal contractors under VEVRAA would employ an additional 205,500 protected veterans and under section 503 employ an additional 594,580 individuals with disabilities. In the aggregate, we anticipate the overall number of hires across both rules will be closer to 715,590. We adjust the reasonable accommodation cost estimates based on the aforementioned assumptions. The total cost of providing reasonable accommodation to employees with disabilities who are not protected veterans is

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<sup>13</sup> Calculation based on unpublished table, Employment status of persons 18 years and over by veteran status, period of service, sex, race, Hispanic or Latino ethnicity, and disability status, Annual Average 2012 (Source: Current Population Survey).

<sup>14</sup> Because of data limitations, OFCCP is using the share of veterans as a proxy for "protected" veterans. For more information on the difference between protected and unprotected veterans, please visit, <http://www.dol.gov/ofccp/regs/compliance/factsheets/vetrights.htm#Q2>

\$114,770,291 in the year the target is met and \$48,524,879 in recurring costs. The requirement to provide reasonable accommodation, however, existed under the ADA, and now exists under the ADAAA for employers. This is not a new obligation created by this rule. Nonetheless, the estimated cost of providing reasonable accommodations is included in this rule.

Employers often think providing a reasonable accommodation is more costly than it actually is. Sometimes an accommodation may be something as simple as allowing someone to have their instructions tape recorded, or allowing someone to wear ear phones so they are not distracted by noise around them, or allowing someone an empty office as space when they have difficulty with concentration or attention span. Employers must provide effective accommodations but are not expected to create an undue hardship for themselves by doing so. Individuals seeking reasonable accommodation beyond what is effective have the option of paying the difference between the cost of the more expensive accommodation and the cost of what the employer will pay for the effective reasonable accommodation.

	<b>Final Rule Low<sup>15</sup></b>	<b>Final Rule High</b>
Total Cost	\$349,510,926	\$659,877,833
Cost Per Company	\$7,550	\$9,716
Cost Per Establishment	\$2,040	\$2,626
Cost Per New Hire	\$588	\$1,110

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<sup>15</sup> The high cost estimates in this chart are based on a contractor establishment count of 251,300 and 67,919 companies while the low estimates are based on 171,275 establishments and 46,291 companies.

Present value costs over ten years for the final rule range from \$1.84 billion to \$3.91 billion using a 3 percent discount rate. If we use a 7 percent discount rate then the present value costs range from \$1.53 billion to \$3.25 billion. Annualizing these costs yields a cost range of \$215 million to \$459 million at the 3 percent discount rate and \$218 million to \$463 million using a 7 percent discount rate.

	7% Discount Rate	3% Discount Rate
Benefits	Not Quantified	Not Quantified
Costs	\$1.53 billion to \$3.25 billion	\$1.84 billion to \$3.91 billion

## Introduction

Strengthening the implementing regulations of section 503, whose stated purpose “requires Government contractors and subcontractors to take affirmative action to employ and advance in employment qualified individuals with disabilities,” is an important means by which the Government can contribute to reducing the employment disparity between those with and without disabilities. The objective of these regulations is to ensure that employers doing business with the Federal Government do not discriminate and that they take affirmative action to recruit, hire, promote and retain individuals with disabilities. More specifically, the final rule has the potential to reduce the employment gap in a number of ways. It adds and strengthens affirmative action requirements designed to improve outreach and recruitment of qualified individual with disabilities; establishes an aspirational goal for the employment of qualified individuals with disabilities that will allow contractors to measure and improve (where appropriate) the effectiveness of those affirmative efforts; provides for greater accountability regarding

employment of individuals with disabilities through collection of several quantitative measures; and provides stronger dissemination of contractor obligations to subcontractors and unions. These measures, taken together, are designed to bring more qualified individuals with disabilities into the Federal contractor workforce and provide them with an equal opportunity to advance in employment.

OFCCP published a Notice of Proposed Rulemaking (NPRM) in the Federal Register on December 9, 2011 (76 FR 77056), seeking comment on a number of proposals that would strengthen the regulations implementing section 503. The NRPM was published for a 60-day public comment period. The NPRM proposed specific actions that contractors and subcontractors must satisfy to meet their section 503 obligations, including increased data collection obligations, and the establishment of a utilization goal for individuals with disabilities. After receiving several requests to extend the public comment period, OFCCP published a subsequent notice in the Federal Register on February 10, 2012 (77 FR 7108), extending the public comment period an additional 14 days.

OFCCP received more than 400 comments on the NPRM. Commenters represented diverse perspectives including: 185 individuals; 105 contractors; 41 groups representing contractors; 48 disability and veterans' rights advocacy groups; and 11 governmental entities. The commenters raised a broad range of issues, including concerns with the cost and burden associated with the proposed rule, the extended recordkeeping requirements, the proposed utilization goal, and the new categories of data collection and analyses. OFCCP carefully considered all comments in the development of this final rule.

Pursuant to Executive Order (EO) 13563, the final rule was developed through a process that involved public participation. Indeed, prior to issuing an NPRM, OFCCP had previously issued an Advanced Notice of Proposed Rulemaking (ANPRM), 75 FR 43116 (July 23, 2010), requesting public comment regarding potential ways to strengthen the section 503 affirmative action regulations. During 2010 and 2011, OFCCP also conducted multiple town hall meetings, webinars, and listening sessions with individuals from the contractor community, state employment services, disability organizations, and other interested parties to understand the features of the section 503 regulations that work well, those that can be improved, and possible new requirements that could help to effectuate the overall objective of increasing employment opportunities for individuals with disabilities with Federal contractors.

### **Compliance with the Final Rule**

Although this final rule becomes effective 180 days after publication, full compliance with the requirements of this final rule by current contractors will be phased in as follows. Current contractors subject to subpart C of the existing 41 CFR part 60-741 regulations that have written affirmative action programs (AAP) prepared pursuant to those regulations in place on the effective date of this final rule may maintain that AAP for the duration of their AAP year. Such contractors are required to update their affirmative action programs to come into compliance with the requirements of subpart C of this final rule at the start of their next standard 12-month AAP review and updating cycle. OFCCP will verify compliance with the requirements of this final rule when a contractor is selected for a compliance evaluation pursuant to § 60-741.60 or subject to a

complaint investigation pursuant to § 60-741.61.

## **Overview of the Final Rule**

The final rule incorporates several of the changes proposed in the NPRM. However, in order to focus the scope of the final rule more closely on key issues, and in an effort to reduce the burden of compliance on contractors, the final rule also revises or declines to adopt some of the NPRM's proposals.

The final rule strengthens the affirmative action provisions for Federal contractors in a number of ways. The rule addresses the increased use of technology in the workplace by allowing for the electronic posting of employee rights and contractor obligations, and by codifying contractors' reasonable accommodation obligation to ensure that any use of electronic job application systems do not result in the denial of equal employment opportunity to individuals with disabilities. Further, the regulations establish a utilization goal, and increase data collection pertaining to applicants and hires, including modifying and standardizing the requirement to invite applicants and existing employees to self-identify as individuals with a disability. These revisions will help contractors better evaluate their outreach and recruitment efforts, and to modify them as needed, toward the end of increasing employment opportunities for individuals with disabilities by Federal contractors and subcontractors. Additionally, as proposed in the NPRM, changes necessitated by the passage of the ADA Amendments Act (ADAAA) of 2008, Pub. L. 110-325, and the subsequent amendment by the Equal Employment Opportunity Commission (EEOC) of their implementing regulations at 29 CFR part 1630 have been made to the rule's definitions and nondiscrimination provisions.

OFCCP revised or eliminated a number of provisions from the NPRM in response to the comments that were received, particularly with regard to the cost and burden of the rule, recordkeeping requirements, data collection and analyses, and the goal. These changes are discussed in full in the Section-by-Section Analysis. However, a summary of the most significant provisions is below.

OFCCP received approximately 130 comments concerning the burdens and costs of the proposed rule from contractor groups, contractors, individuals and government entities. Many of these commenters stated that OFCCP's estimates of costs and hours were too low. A few commenters also suggested that OFCCP's contractor universe was too small. In response to these concerns, OFCCP modified the burden and cost estimates for the final rule. These changes provide a more accurate estimation of the burden and costs associated with the final rule. As discussed in the NPRM, the overall contractor universe of 171,275 contractor and subcontractor establishments was derived from the Fiscal Year 2009 Employer Information Report EEO-1 (EEO-1), the Federal Procurement Data System-Next Generation (FPDS-NG) report data on contractor establishments, and other pertinent information. OFCCP notes that there were comments on the contractor universe recommending an establishment count of 285,390 using the Veterans Employment Training Services (VETS) annual report. While OFCCP declines to exclusively rely on the VETS report number, we present an estimated high end for the range of the cost of the rule based on a contractor establishment number of 251,300. This number is based on 2010 VETS data from their pending Information Collection



Request.<sup>16</sup> As discussed in more detail below, OFCCP also made key changes to the recordkeeping requirements to minimize the burden on contractors.

The NPRM proposed that contractors maintain data pursuant to §§ 60-741.44(f)(4) (linkage agreements and other outreach and recruiting efforts) and 60-741.44(k) (collection of applicant and hire data) for five years. More than 50 commenters opposed these provisions. Several of the commenters were particularly concerned about the burden associated with the five-year requirement. In response, OFCCP has reduced the proposed five-year recordkeeping requirement to three years in the final rule. Further, in light of the comments we received, the final rule does not incorporate the proposal in § 60-741.44(k) of the NPRM to maintain data related to referrals from State agencies and other organizations. Commenters expressed concern with this requirement, indicating that State agencies either cannot provide data or provide data inconsistently across the states. In reviewing the practical utility of the referral data in light of the burden that it would create on contractors, OFCCP has eliminated the requirement to collect and analyze referral data. Eliminating the referral data requirement and reducing the length of recordkeeping minimizes the burden on contractors, while still requiring contractors to keep adequate records to aid and inform their outreach and recruitment efforts.

The NPRM also proposed to require many of the affirmative action efforts that are only suggested in § 60-741.44 of the existing rule. Among these were proposals requiring contractors to: review personnel processes on an annual basis (§ 60-741.44(b));

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<sup>16</sup>OMB Control Number 1293-0005, Federal Contractor Veterans' Employment Report, VETS - 100/VETS-100A , [http://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201104-1293-003](http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201104-1293-003) (last accessed Aug. 13, 2013).

review physical and mental qualification standards on an annual basis (§ 60-741(c)); establish linkage agreements with three disability-related agencies or organizations to increase connections between contractors and individuals with disabilities seeking employment (§ 60-741.44(f)); take certain specified actions to internally disseminate its affirmative action policy (§ 60-741.44(g)); and train personnel on specific topics related to the employment of individuals with disabilities (§ 60-741.44(j)). After consideration of the comments and taking into account the expected utility of these provisions in light of the burden that contractors would incur to comply with the proposals, OFCCP decided not to incorporate the majority of these proposals into the final rule, and instead retains the language in the existing rule. These NPRM proposals, for the most part, would have required certain specific actions contractors must take to fulfill their already existing, general affirmative action obligations. These general affirmative action obligations - reviewing personnel processes and qualification standards on a periodic basis, undertaking appropriate outreach and positive recruitment activities, developing internal procedures to disseminate affirmative action policies, and training its employees on these policies – remain in the final rule. By eliminating the specific provisions but maintaining the general affirmative action obligations, the final rule provides the contractor flexibility and lesser burden, while still requiring the maintenance and implementation of a robust affirmative action program.

The final rule adopts, but modifies, the proposed establishment of a national utilization goal for individuals with disabilities. The NPRM proposed to establish a single utilization goal of 7 percent per job group. OFCCP also requested public comment on several issues, including the possible establishment of a sub-goal for specific targeted

disabilities, the availability of alternative data sources, and a range of potential goal values between 4 percent and 10 percent and the justification for their use. As discussed in more detail in the preamble to § 60-741.45, below, OFCCP received approximately 250 comments on the proposed goal. Disability and veterans' organizations, as well as many individuals, supported the establishment of a goal, while most contractors and employer associations were generally opposed. Most commenters who opposed the proposed goal asserted that any goal would be arbitrary and ineffective because of deficiencies in source data regarding the availability of qualified individuals with disabilities. In addition, some commenters stated their belief that the goals were illegal quotas and would adversely impact other protected groups. Supporters of the goal argued that the establishment of a goal was long overdue, given the long history of employment discrimination against individuals with disabilities, and the extremely low participation rate of people with disabilities in the labor force. The final rule retains the 7 percent per job group national utilization goal, but declines to adopt a sub-goal at this time. In response to commenters, the final rule clarifies that the failure to meet the goal, in and of itself, is not a violation of this part, and what contractors must do when the goal is not met. More specifically, the final rule identifies steps for the contractor to take to ascertain whether there are impediments to equal employment opportunity and, if impediments are found, to correct any identified problems. If no impediments are identified, then no corrective action is required. The goal is not a rigid and inflexible quota which must be met, nor is it to be considered either a ceiling or a floor for the employment of particular groups. Quotas are expressly forbidden.

The NPRM proposed substantial changes to the requirement that contractors invite applicants to self-identify as individuals with disabilities by adding to the existing post-offer invitation requirement both a pre-offer invitation requirement and an annual survey of all employees. It also detailed proposed mandatory language for these invitations. As discussed in detail in the Section-by-Section Analysis, OFCCP received more than 130 comments on this provision from a broad range of perspectives. The final rule adopts the NPRM requirement to invite self-identification from applicants both before and after a job offer has been made. Instead of adopting the proposal for annual self-identification, the final rule adopts an every five year invitation for employees to self-identify with an interim reminder to employees of their ability to change their status. In response to the comments, OFCCP will simplify the language of the invitations and consolidate them into a single form for contractors to use when inviting self-identification. When finalized, the form will be available on the OFCCP Web site.

The NPRM proposed to require that contractors develop and implement written procedures for processing requests for reasonable accommodation and prescribed specific mandatory elements that the procedures must contain. This proposal prompted strong support and strong criticism from commenters. After consideration of the comments, OFCCP decided not to require the development of written reasonable accommodation procedures and eliminated proposed § 60-741.45. Instead, the final rule notes that using written reasonable accommodation procedures is a best practice that may assist contractors in meeting their reasonable accommodation obligations. The final rule states that contractors are not required to use such procedures and will not be found in violation of this part for not using such procedures. However, for the benefit of contractors that

choose to adopt this best practice, the final rule also contains a new Appendix B that provides guidance for contractors on establishing written reasonable accommodation procedures.

The final rule presents a significant revision of the section 503 regulations. The detailed Section-by-Section Analysis below identifies and discusses all of the final changes in each section. For ease of reference, part 60-741 will be republished in its entirety in the final rule.

## **SECTION-BY-SECTION ANALYSIS**

### **41 CFR PART 60-741**

#### **Subpart A – Preliminary Matters, Equal Opportunity Clause**

##### **Section 60-741.1 Purpose, applicability, and construction**

Section 60-741.1 of the current rule sets forth the scope of section 503 and the purpose of its implementing regulations. The NPRM proposed three minor changes to this section. Specifically, it proposed to add language to paragraph (a) referencing contractors' nondiscrimination obligation; to modify the citation to the "Americans with Disabilities Act of 1990" (ADA) in paragraph (c) to reflect that statute's amendments by the ADA Amendments Act of 2008; and to add a new paragraph (c)(2) (and renumber existing paragraph (c)(2) as (c)(3)) to reflect the ADAAA's affirmation, in section 6(a)(1), that nothing in the statute "alters the standards for determining eligibility for benefits" under State worker's compensation laws or under State and Federal disability benefit programs. We received no comments on these proposed changes. Accordingly, OFCCP adopts the proposed revisions in the final rule without alteration.

## Section 60-741.2 Definitions

The NPRM incorporated the vast majority of existing definitions contained in §60-741.2 without change. However, OFCCP proposed several changes to the substance and structure of this section. With regard to structure, OFCCP proposed to reorder the definitions so that they are primarily in alphabetical order, rather than in order by subject matter.

With regard to substantive changes, the NPRM proposed several revisions relating to the definition of “disability” and its component parts resulting from the passage of the ADAAA, which became effective on January 1, 2009, and which amends both the ADA and Section 503. These include revisions to the definitions of “disability” (paragraph (g)), “major life activities” (paragraph (m)), “mitigating measures” (paragraph (n)), “regarded as having such an impairment” (paragraph (v)), and “substantially limits” (paragraph (z)). It is OFCCP’s intention that these terms will have the same meaning as set forth in the ADAAA, and as implemented by the EEOC in its revised regulations published at 76 FR 16978 (March 25, 2011). In addition to revisions related to the definition of “disability,” the NPRM also proposed to replace the term “Deputy Assistant Secretary” with the term “Director,” and added a definition of “linkage agreement.” OFCCP received 18 comments on the proposed changes to § 60-741.2 from a variety of entities including individuals, contractors, and associations.

- Definitions related to “Disability”

Commenters generally commended OFCCP for its efforts to bring consistency to the definitions used in section 503 and those in the ADAAA, noting, for example, that the “contractor community and individuals with disabilities are well-served by a consistent

and uniform approach.” A few commenters asserted that the new definition of “disability” was overly broad and that, as a result, these commenters were concerned that “a majority of individuals in the labor force may consider themselves as disabled.”

In amending the ADA, Congress made clear its intent to ensure a “broad scope of protection” for “disability,” and to ensure that this broad scope is not unduly “narrowed” by administrative or court rulings. See ADAAA at section 2. OFCCP’s revised definitions incorporate the ADAAA’s requirements, which, as previously noted, apply equally to section 503. We therefore adopt the NPRM’s revised definitions related to “disability” into the final rule.

- Definition of “Director”

We received no comments on the new definition of “Director,” and it is adopted into the final rule as proposed.

- Definition of “Linkage Agreement”

We received no comments on the proposed definition of “linkage agreement.” However, as the final rule eliminates the requirement for contractors to enter into linkage agreements, there is no need for the regulation to contain a definition for it, and thus it is eliminated from the final rule. See discussion of § 60-741.44(f) below.

- Additional Definitions

Several commenters representing the contractor community requested that OFCCP add formal definitions for “applicant” and for “Internet applicant,” as those terms are defined in the Executive Order 11246 (EO 11246) implementing regulations at 41 CFR part 60-1. While OFCCP does not formally adopt the definition of “Internet applicant” into the section 503 regulations, OFCCP is harmonizing the requirements of

the section 503 regulations and the Internet Applicant Rule. OFCCP provides further guidance on this issue in the preamble discussion related to § 60-741.42.

#### Section 60-741.3 Exceptions to the definitions of “disability” and “qualified individual”

The NPRM proposed to modify this section by changing the terms “individual with a disability” and “qualified individual with a disability” in the section title, as well as throughout the section, to “disability” and “qualified individual,” respectively, in accordance with the ADAAA. No comments were received regarding these non-substantive changes, and OFCCP therefore adopts them in the final rule.

#### Section 60-741.4 Coverage and waivers

The proposed rule removed the text of paragraph (a)(2) as the “contract work only” exception applied to “employment decisions and practices occurring before October 29, 1992” and has now expired. Accordingly, the NPRM also renumbered paragraphs (3), (4), and (5) as paragraphs (2), (3), and (4). No comments were received on this proposed revision and OFCCP adopts it into the final rule.

#### Section 60-741.5 Equal opportunity clause

The NPRM proposed several changes to the content of the Equal Opportunity (EO) Clause found in § 60-741.5, and to the manner in which the EO Clause is included in Federal contracts. We received a total of 23 comments on these proposals. The proposals, the comments to these proposals, and the revisions made to the final rule are discussed in turn below.



- EO Clause Paragraph 1 – Statement Requiring that Contractors Not Discriminate on the Basis of Disability

In paragraph 1 of the EO clause, the NPRM proposed to modify the phrase “to employ, advance in employment and otherwise treat qualified individuals with disabilities without discrimination based on their physical or mental disability” to read “to employ and advance in employment individuals with disabilities, and to treat qualified individuals without discrimination on the basis of their physical or mental disability . . . .” This formulation more closely mirrors the language and intent of the ADAAA. Only two comments were received regarding this change. One requested that we also delete the word “because” from the first sentence of paragraph 1 for consistency with the ADAAA, while the other asked that we add the word “qualified” before the phrase “individuals with disabilities.” OFCCP does not believe that the first sentence of paragraph 1 is inconsistent with the ADAAA and declines to make this change. OFCCP also declines to add the word “qualified” as requested. The phrase “qualified individuals with disabilities” is used in the ADAAA solely in the context of the entitlement to reasonable accommodation, which is not the subject of the revised sentence. Thus, it would not be consistent with the ADAAA to use that phrasing in this sentence. The NPRM’s changes to paragraph 1 of the NPRM are adopted and set forth in the final rule as proposed.

- EO Clause Paragraph 4 – Electronic Notice Posting and Accessible Formats

In paragraph 4, we proposed two revisions. First, the proposed regulation revised the parenthetical at the end of the third sentence of this paragraph to replace the outdated suggestion of reading the notice to a visually impaired individual as an accommodation

with the suggestion to provide the notice in Braille, large print, or other alternative formats, so that the individual with a disability may read the notice him/herself. The proposed regulation also addressed the electronic posting of notices by contractors to satisfy the contractors' posting obligation in the context of telecommuting, work arrangements that do not include a physical office setting, and the use of electronic or Internet-based application systems. It proposed that the contractor be able to satisfy its posting obligation through electronic means for employees who telework, provided that the contractor provides computers to its employees or otherwise has actual knowledge that employees can access the notice. To clarify, "actual knowledge" does not mean actual knowledge that the employee accessed the notice, but rather actual knowledge that the notice was posted or disseminated in such a way that would be accessible to the employee. The NPRM further proposed that contractors that use an electronic application process be required to use an electronic posting, and be required to conspicuously store the electronic notice with, or as part of, the electronic application.

OFCCP received two comments regarding paragraph 4 of the EO Clause. One commenter expressed uncertainty as to what point in the hiring process a contractor is required to provide an alternative version of the notice. A contractor must provide an alternate version of the notice to an applicant with a disability at the same point in the process that it would provide the notice to applicants without disabilities, and upon request. The second commenter recommended that the EO Clause require that electronic notices be available in an accessible format. Paragraph 4 of the EO Clause clearly states that "The contractor must ensure that applicants or employees with disabilities are provided the notice in a form that is accessible and understandable to the individual

applicant or employee.” Contractors are thus already expected to provide the notice in accessible format, if needed.

In the final rule, OFCCP has adopted the proposed changes to paragraph 4 of the EO Clause. We have also added a clarification stating that a contractor is able to satisfy its posting obligation by electronic means for employees who do not work at a physical location of the contractor, provided that the contractor provides computers or access to computers that can access the electronically posted notices. This clarifies that electronic posting is appropriate not only for employees who telework, but also for those who share work space – and contractor provided computers– at a remote work center.

- EO Clause Paragraph 7- Contractor Solicitations and Advertisements

The proposed rule added a new paragraph 7 to the EO clause that would require the contractor to state and thereby affirm in solicitations and advertisements that it is an equal employment opportunity employer of individuals with disabilities. A comparable clause already exists in the equal opportunity clause of Executive Order 11246 regulations. See 41 CFR 60-1.4(a)(2).

OFCCP received three comments objecting to this proposal. These commenters asserted that this requirement would be too burdensome since newspapers and other publications charge for each word of a solicitation and that the word “solicitation” was undefined and thus open to broad interpretation.

The word “solicitation” is also used, along with the word “advertisements,” in the Executive Order regulations. It has been broadly construed for many years to refer to any job listing, announcement, or advertisement, and would have the same meaning in the section 503 regulations. With regard to the assertion of burdensomeness, as noted in the

NPRM, contractors are already required under Executive Order 11246 to state in advertisements and solicitations that “all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, or national origin.” See 41 CFR 60-1.4(a)(2). The requirement set forth in paragraph 7 of the NPRM would require adding the single word “disability” to the language that contractors are already required to use in advertisements. This is a very minor change involving nominal time and expense to contractors that will affirm to jobseekers and the public the fact that individuals with disabilities are entitled to non-discrimination and affirmative action in the workplaces of Federal contractors. Accordingly, the language in paragraph 7 of the NPRM is adopted into the final rule as proposed.

- Inclusion of EO Clause in Federal Contracts (proposed 60-741.5(d))

Finally, the NPRM proposed requiring that the entire EO Clause be included verbatim in Federal contracts. This proposed change was to ensure that the contractor, and particularly any subcontractor, who often relies on the prime contractor to inform it of its nondiscrimination and affirmative action obligations, reads and understands the language in this clause. OFCCP received nineteen comments, all opposing the verbatim inclusion of the EO Clause in contracts. The commenters primarily asserted that this requirement would be too burdensome, as the length of the contract would increase significantly to perhaps double or even triple its original length in some instances.

In light of the comments and upon further consideration of the issue, the final rule does not require express inclusion of the entire EO Clause into Federal contracts. In addition to the burden concerns set forth by commenters, there is concern that the length of the EO Clause will dissuade, rather than promote, contractors and subcontractors from

reading and taking note of their non-discrimination and affirmative action obligations. This is contrary to the intent behind the proposal in the NPRM.

However, the requirement in the existing regulations does little to notify contractors and subcontractors of the nature of their obligations to employ and advance in employment qualified individuals with disabilities, which was a primary objective of the NPRM proposal. Accordingly, in order to draw greater attention to the contractors' obligations under section 503 without the burden of including the entire section 503 EO Clause, the final rule revises paragraph (d) of this section to require the following text, set in bold text, in each contract, following the reference to the section 503 regulations: "This contractor and subcontractor shall abide by the requirements of 41 CFR 60-741.5(a). This regulation prohibits discrimination against qualified individuals on the basis of disability, and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified individuals with disabilities."

## **Subpart B--Discrimination Prohibited**

### **Section 60-741.21 Prohibitions**

This section of the rule describes types of conduct that would violate the non-discrimination requirements of section 503. The NPRM renumbered the section's paragraphs, captioning the introductory sentence as (a), and renumbering existing paragraphs (a) through (i) as paragraphs (1) through (9). The NPRM also proposed several substantive changes, most of which are necessitated by the ADAAA. A new paragraph (iv) was added to paragraph (a)(6) regarding reasonable accommodation (§ 60-

741.21(f) of the existing regulations) to clarify that a contractor is “not required” to provide reasonable accommodation to individuals who “satisfy only the ‘regarded as having such an impairment’ prong of the definition of disability.” A new paragraph (ii) was added to paragraph (a)(7) regarding qualification standards (§ 60-741.21(g) of the existing regulations) to incorporate the ADAAA’s specific prohibition on the use of qualification standards, employment tests, or other selection criteria that are “based on an individual’s uncorrected vision” unless the standard, test, or other selection criteria, as used by the contractor, “is shown to be job-related for the position in question and consistent with business necessity.” We also proposed adding a sentence to paragraph (a)(9) regarding compensation (§60-741.21(i) of the existing regulations) to clarify that it would be impermissible for a contractor to reduce the compensation provided to an individual with a disability because of the “actual or anticipated cost of a reasonable accommodation the individual needs or may request.” Lastly, the NPRM added a new subsection (b) to incorporate the ADAAA’s prohibition on claims of discrimination because of an individual’s lack of disability.

OFCCP received no comments regarding any of these proposed changes. We did, however, receive one comment suggesting we add “disparate work assignments” as an example of a method by which an employer may discriminate against an employee with a disability. While we agree with the point, we note that the nondiscrimination requirement of the rule already broadly encompasses “any other term, condition, or privilege of employment,” including work assignments, as well as every other aspect of employment. See § 60-741.20(i). We therefore decline to make this suggested change, as discrimination in work assignments is already prohibited by the section 503

regulations. Accordingly, OFCCP adopts the revisions proposed in the NPRM into the final rule, except that proposed paragraph (a)(6)(iv) is renumbered paragraph (a)(6)(v) in the final rule.

In addition, the final rule adds two new paragraphs to paragraph (a)(6). The NPRM proposed, in section § 60-741.44(d), that as a matter of affirmative action, the contractor “must ensure” that its online job application systems are “compatible with” assistive technology used by individuals with disabilities. In response to concerns raised by commenters, OFCCP decided not to include this provision in the final rule and to instead codify its publicly stated position that the nondiscrimination obligation to make reasonable accommodation includes contractors’ use of electronic or online job application systems and requires that contractors ensure equal access to job opportunities. Although we are not including the proposed provision in the final rule, OFCCP notes in paragraph (a)(6)(iii) that it is a best practice for contractors to make their online systems accessible and compatible with assistive technologies used by individuals with disabilities. See the preamble to § 60-741.44(d), below, for a discussion of the comments. The codification of this position, first stated publicly in Directive 281, Federal Contractor’s Online Application Selection System (July 10, 2008), on line at <http://www.dol.gov/ofccp/regs/compliance/directives/dir281.htm>, is in paragraph (a)(6)(iii) of the final rule.

Paragraph (a)(6)(vi) of § 60-741.21 of the final rule is also new. The NPRM proposed a new § 60-741.45 requiring contractors to develop and implement written procedures for processing requests for reasonable accommodation, and providing minimum elements that contractors’ reasonable accommodation procedures must address.

After further consideration of the burden associated with this provision, OFCCP has decided not to incorporate this obligation in the final rule. See the preamble to § 60-741.45, below, for a discussion of the comments regarding this section. Instead, in new paragraph (vi) to paragraph (a)(6) of § 60-741.21, the final rule notes that using written reasonable accommodation procedures is a best practice that may assist contractors in meeting their reasonable accommodation obligations. This paragraph states that contractors are not required to use such procedures and will not be found in violation of this part for not using such procedures. However, for the benefit of contractors that choose to adopt this best practice, the final rule also contains a new Appendix B that provides guidance for contractors on establishing written reasonable accommodation procedures.

#### Section 60-741.23 Medical examinations and inquiries

The proposed rule modified paragraph (b)(4) to clarify that voluntary medical examinations and activities need not be job-related and consistent with business necessity, and revised paragraph (b)(5) to eliminate the existing paragraph's reference to (b)(4). We received no comments on these proposed changes and adopt them into the final rule as proposed.

#### Section 60-741.25 Health insurance, life insurance and other benefit plans.

The proposed rule revised paragraph (d) by changing the current rule's two references to "qualified individual with a disability" to "individual with a disability," as the ability to perform essential functions, inherent in the definition of "qualified



individual,” is not relevant to insurance considerations. We received no comments on this proposed change and adopt it into the final rule as proposed.

### **Subpart C--Affirmative Action Program**

#### **Section 60-741.40 General purpose and applicability of the affirmative action program requirement**

The proposed rule proposed changes to the structure of this section by adding a statement of purpose in new paragraph (a), reordering and recaptioning existing paragraphs (a), (b), (c), and (d), and revising the language of existing paragraph (c), renumbered as paragraph (b)(3) in the final rule, to require that the affirmative action program be reviewed and updated annually “by the official designated by the contractor pursuant to §60-741.44(i).”

- **Paragraph (a): General Purpose**

Proposed paragraph (a) stated that an affirmative action program is a management tool designed to ensure equal employment opportunity and foster employment opportunities for individuals with disabilities. The proposed paragraph also noted that an affirmative action program “is more than a paperwork exercise,” and “includes measurable objectives, quantitative analyses, and internal auditing and reporting systems that measure the contractor’s progress toward achieving equal employment opportunity for individuals with disabilities.”

A total of 22 comments were received from disability, veteran and employer associations, and from several individual employers about paragraph (a). Eighteen of the 22 comments expressed support for proposed paragraph (a) as “helpful,” and asserted that the proposal would bring the section 503 regulations in line with the regulations

implementing the affirmative action obligations of EO 11246 on behalf of minorities and women. These commenters also asserted that paragraph (a) would be strengthened by the addition of language that the AAP is designed to “effectuate” and measure the contractor’s progress toward achieving equal employment opportunity for individuals with disabilities. In contrast, three comments from employers and an employer association expressed general opposition to the proposed paragraph. One commenter asserted the transportation industry should be exempt. Another commenter stated that the proposed changes to the regulations would impose financial burdens on small and medium sized businesses.

OFCCP agrees with the majority of commenters that proposed paragraph (a) accurately describes the general purpose of contractors’ affirmative action program obligations and is consistent with the implementing regulations of EO 11246. We believe it is important to clearly articulate OFCCP’s expectation that contractors’ affirmative action programs will result in progress toward effectuating equal employment opportunity objectives for individuals with disabilities. With respect to the comment requesting an exemption for the transportation industry, we note that such a request must be made to the Director as provided in § 60-741.4(b) of the regulations and cannot be sought through a public comment on the NPRM. OFCCP therefore declines to grant the requested waiver. Consequently, proposed paragraph (a) is adopted without change.

- Paragraph (b): Applicability of the affirmative action program

No comments were received regarding the addition to proposed new paragraph (b)(3), previously paragraph (c), indicating that the affirmative action program shall be

reviewed and updated annually “by the official designated by the contractor pursuant to § 60-741.44(i).” Proposed paragraph (b) is adopted without change.

No comments were received regarding the reordering of § 60-741.40, and these changes are, likewise, adopted without change.

#### Section 60-741.41 Availability of affirmative action program.

The proposed regulation proposed requiring that, in instances where the contractor has employees who “telework” or otherwise do not work at the contractor’s physical establishment, the contractor shall inform these employees about the availability of the affirmative action program by means other than a posting at its establishment. This proposal in many respects mirrored the electronic notice requirements set forth in paragraph 4 of the EO Clause at § 60-741.5 of the rule.

A few commenters from the contractor community asserted that the NPRM’s inclusion in the AAP of the data required to be collected and analyzed by proposed § 60-741.44(k) could result in the AAP including sensitive, trade secret, or proprietary information. These commenters expressed concern that this information would be available, under proposed § 60-741.41 to any applicant or employee.

In response to these comments, OFCCP revises the language for the final rule to state that “[t]he full affirmative action program, absent the data metrics required by § 60-741.44(k), shall be made available to any employee or applicant...” (revisions emphasized). This balances the interest in confidentiality of the contractor and its employees with the need for transparency regarding the contractor’s affirmative action efforts. In addition, as part of the effort to focus the final rule on those elements that are

of critical importance to OFCCP, while reducing the burden on contractors where possible, the final rule does not incorporate the NPRM proposals regarding informing off-site individuals about the availability of the contractor's affirmative action program. Rather, the final rule retains the language in the existing § 60-741.41 in that regard.

#### Section 60-741.42 Invitation to self-identify

The NPRM proposed five significant revisions to this section of the regulation: (1) requiring the contractor to invite all applicants to self-identify as having a disability prior to an offer of employment, using the language and manner prescribed by the Director (paragraph (a)); (2) retaining but modifying the post-offer self-identification invitation requirement in the existing regulation (paragraph (b)); (3) requiring contractors to annually, and anonymously, survey their employees, using the language and manner prescribed by the Director (paragraph (c)); (4) emphasizing that the contractor is prohibited from compelling or coercing individuals to self-identify (paragraph (d)); and (5) requiring contractors to keep all information regarding self-identification as an individual with a disability confidential, and maintained in a data analysis file in accordance with § 60-741.23 of this part. The NPRM also proposed eliminating the sample invitation to self-identify in Appendix B of the existing rule, and invited public comment on potential language for the text of the mandated invitation to self-identify for contractors to use.

OFCCP received 136 comments on this section from a broad array of perspectives, including contractors, law firms, government agencies and individuals, as well as from organizations representing individuals with disabilities, veterans, and

contractors. By and large, individuals with disabilities, and disability advocacy organizations were supportive of the three-step approach to voluntary self-identification of disability proposed in the NPRM, while contractors and contractor organizations opposed the proposed approach.

Commenters opposed to the proposed self-identification rubric raised various concerns, including: (1) that the pre-offer invitation to self-identify allegedly conflicts with the Americans with Disabilities Act (ADA); (2) the potential interplay between the pre-offer data collection requirement and the Internet Applicant Rule set forth in regulations for Executive Order 11246; (3) the possibility of inaccurate self-reporting and underreporting; (4) the potential for contractors to be exposed to discrimination claims as a result of having knowledge about the existence of a disability; and (5) cost and burden issues. Additionally, some of those who favored the proposed self-identification approach joined those opposed in questioning the wording and readability of the proposed invitation to self-identify included in the NPRM preamble. The proposals, the comments regarding these proposals, and the revisions made in the final rule are discussed in turn below (with the exception of some specific comments on burden, which are addressed in the Regulatory Procedures section of the final rule).

- Paragraph (a): Pre-offer invitation to self-identify

Paragraph (a) of the NPRM proposed requiring the contractor to invite all applicants to voluntarily self-identify as individuals with disabilities whenever the applicant applies for or is considered for employment. As discussed in the NPRM, the primary reason for proposing a pre-offer invitation to voluntarily self-identify is to collect important data pertaining to the participation of individuals with disabilities in the contractor's applicant pools and workforces. This data would enable the contractor and

OFCCP to better monitor and evaluate the contractor's hiring and selection practices with respect to individuals with disabilities. Furthermore, data related to the pre-offer stage of the employment process would be particularly helpful, as it would provide the contractor and OFCCP with valuable information regarding the number of individuals with disabilities who apply for jobs with contractors. In turn, this data would assist OFCCP and the contractor in assessing the effectiveness of the contractor's recruitment efforts over time, and in refining and improving the contractor's recruitment strategies, where necessary.

There was support for this provision, among individuals with disabilities and disability advocacy organizations. One commenter stated that a study conducted by the Cornell University ILR School and the American Association of People with Disabilities had found that applicants are most likely to self-identify as having a disability during the recruitment process. On the other hand, several other commenters expressed concern about this paragraph. Most prominently, commenters were concerned that requiring contractors to invite applicants to reveal whether they have a disability pre-offer could expose contractors to an increased risk of liability under the ADA, and that pre-offer self-identification conflicted with that statute's general ban on pre-offer inquiries about disability and guidance issued by EEOC and OFCCP.

OFCCP believes that concerns regarding the possibility of a conflict with the ADA or related guidance are based on an incorrect reading of the ADA and its regulations. As discussed in the NPRM, the ADA and section 503 regulations specifically permit the contractor to conduct a pre-offer inquiry about disability if it is "made pursuant to a Federal, state or local law requiring affirmative action for individuals

with disabilities,” such as section 503. Furthermore, EEOC has clearly stated that “collecting information and inviting individuals to identify themselves as individuals with disabilities as required to satisfy the affirmative action requirements of section 503 of the Rehabilitation Act is not restricted” by the ADA or EEOC’s implementing regulations. See 29 CFR 1630.13, 1630.14 and its Appendix; 41 CFR 60-741.42. EEOC has reiterated this exception to the prohibition on pre-offer inquiries about disability in sub-regulatory technical assistance guidance.<sup>17</sup> For example, EEOC’s Title I Technical Assistance Manual, online at [www.askjan.org/LINKS/ADAtam1.html](http://www.askjan.org/LINKS/ADAtam1.html), states:

5.5(c) Exception for Federal Contractors Covered by Section 503 of the Rehabilitation Act and Other Federal Programs Requiring Identification of Disability. Federal contractors and subcontractors who are covered by the affirmative action requirements of Section 503 of the Rehabilitation Act may invite individuals with disabilities to identify themselves on a job application form or by other pre-employment inquiry, to satisfy the affirmative action requirements of Section 503 of the Rehabilitation Act. Employers who request such information must observe Section 503 requirements regarding the manner in which such information is requested and used, and the procedures for maintaining such information as a separate, confidential record, apart from regular personnel records.

The ADA, thus, clearly allows the type of pre-offer self-identification invitation proposed in the NPRM.

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<sup>17</sup> To assuage any remaining doubt on this matter, OFCCP obtained a letter from EEOC’s Office of Legal Counsel in advance of the publication of this rule affirming that the pre-offer invitation to self-identify as an individual with a disability required by this final rule is permissible under the ADA and its implementing regulations. This letter will be posted on the OFCCP Web site.

Some commenters were also concerned that obtaining information about the disability status of an applicant could potentially expose contractors to claims of discrimination by disappointed job seekers. These commenters stated that obtaining information that an applicant has a disability would give them “knowledge” of the existence of a disability - a necessary component to any disparate treatment discrimination claim - and that the pre-offer invitation requirement eliminates an important protection for contractors.

OFCCP acknowledges that knowledge of the existence of a disability, like knowledge of a person’s race, ethnicity, or gender, which are regularly self-reported and collected by contractors, is a component of an intentional discrimination claim. However, to find intentional discrimination it must be proven not only that the contractor knew that a person had a disability (or was of a particular race, ethnicity, or gender), but that the contractor treated the person less favorably because of his or her disability (or race, ethnicity, or gender). We note, moreover, that contractors have long had knowledge of the disabilities of applicants who have visible disabilities, such as blindness, deafness, or paraplegia, but that OFCCP has had no means of knowing of their presence in the applicant pool or their experience in the application and selection process. Requiring contractors to invite pre-offer self-identification will help fill this void. Lastly, OFCCP points out that, generally, self-identification information will be obtained by, and reside with, Human Resources (HR) offices and will not be provided to interviewing, testing, or hiring officials, as it is confidential information that must be kept separate from regular personnel records. This will help ensure that these officials do not, in fact, have knowledge of which applicants have chosen to self-identify as having a disability.



Several commenters were concerned that self-identification would be unreliable in truly measuring the number of individuals with disabilities in the applicant pool, as many applicants will not self-identify or will do so incorrectly. Indeed the same study cited above showed that at best, only about 50 percent of those with disabilities were likely to respond. Commenters also asked OFCCP to clarify whether contractors would be allowed to identify an individual as having a disability who does not self-identify. These commenters expressed concern that not permitting contractors to identify applicants with known or obvious disabilities who do not self-identify as having a disability, would only increase the degree of underreporting, make it more difficult for contractors to meet the NPRM's proposed utilization goal, and possibly result in erroneous findings that the goal has not been met.

OFCCP concedes that there likely will be significant underreporting, especially at the beginning, meaning that self-reported data regarding disability will not give a full picture of the applicant pool. We disagree, though, that this is alone sufficient reason to eliminate the pre-offer invitation. While not perfect, the data that will result from the pre-offer invitation requirement will provide the contractor and OFCCP with important data that does not now exist pertaining to the participation of individuals with disabilities in the contractor's applicant pools. The hope is that this will allow the contractor and OFCCP to better identify, monitor, and evaluate the contractor's hiring and selection practices with respect to individuals with disabilities. We also believe that the response rate to the invitation to self-identify will increase over time, as people become accustomed to the invitation and workplaces become more welcoming to individuals with disabilities.

With regard to the question of contractors identifying individuals with disabilities who do not self-identify, we note that contractors subject to Executive Order 11246 have long been permitted to identify the race, gender, and ethnicity of applicants who do not voluntarily self-identify, but may not guess or speculate when so doing. See Frequently Asked Questions for the Employer, online at <http://www.dol.gov/ofccp/regs/compliance/faqs/emprfaqs.htm#Q10>. OFCCP believes that a comparable interpretation of the section 503 voluntary self-identification provisions is appropriate. The final rule requires contractors to maintain several quantitative measurements regarding individuals with disabilities who have applied or been hired for jobs (§ 60-741.44(k)). Contractors are also required to annually assess their utilization of individuals with disabilities in each job group against a national utilization goal, and to take specific steps to ascertain the existence of, and correct, any impediments to equal employment opportunity if the goal is not met (§ 60-741.45). In light of these requirements and the overall objective of measuring progress toward equal employment opportunity for people with disabilities, it is important that the reporting of disability demographic information be as accurate as possible. OFCCP therefore believes that it is appropriate to allow contractors to identify an individual as having a disability for the purposes of §§ 60-741.44(k) and 60-741.45, if the individual does not voluntarily self-identify when: (1) the disability is obvious (e.g., someone is blind or missing a limb) or (2) the disability is known to the contractor (e.g., an individual says that he or she has a disability or requests reasonable accommodation for a disability).

OFCCP believes that this approach strikes the appropriate balance between the privacy concerns of those with disabilities and the need for reporting information to be as

accurate as possible. Pursuant to the final rule, disability demographic information must be kept confidential and maintained in a data analysis file. Such information may not be included in an individual's personnel file. Contractors are also reminded that they may not guess or speculate when identifying an individual as having a disability. Nor may they assume that an individual has a disability because he or she "looks sickly" or behaves in an unusual way.

Another concern raised by several commenters is that the requirement to collect and maintain self-identification data from applicants does not comport with the Internet Applicant Rule found in the regulations to Executive Order 11246. See 41 CFR 60-1.3, 1.12. These commenters recommended that OFCCP add a definition of "applicant" and "Internet applicant" to this final rule and ensure that wherever in the regulations the term "applicant" is used, the term "Internet applicant" applies as well. OFCCP did not propose to add a definition of "applicant" or "Internet applicant" in its NPRM. Therefore, the final rule does not do so. However, the discussion that follows provides guidance about how contractors may invite Internet applicants to self-identify as an individual with a disability under section 503 in a manner consistent with demographic collection requirements under the Executive Order Internet Applicant Rule. Under this final rule, contractors will be able to invite applicants to self-identify as an individual with a disability at the same time the contractor solicits demographic data on applicants under the Executive Order 112146 Internet Applicant Rule. For Internet applicants this generally will be after the contractor has determined the individual has been screened for basic qualifications and meets other requirements for being an Internet applicant.

Therefore, this rule does not require contractors to change their existing systems for screening Internet applicants so long as those systems comply with existing law.

By way of background, OFCCP's longstanding definition of "applicant" is contained in agency subregulatory guidance. See the Uniform Guidelines on Employee Selection Procedures (UGESP), Question and Answer 15, 44 FR 11996 (March 2, 1979).<sup>18</sup> According to that guidance, in general, an applicant is a person who has indicated an interest in being considered for hiring, promotion, or other employment opportunities, either in writing (by completing an application form or submitting a resume) or orally, depending upon the contractor's practice. The Internet Applicant Rule came into effect in February 2006, and pertains to recordkeeping by contractors on Internet-based hiring processes and the solicitation of race, gender, and ethnicity data, in conjunction with their recordkeeping obligations under the Executive Order implementing regulation at § 60-1.12. Under § 60-1.12, contractors' recordkeeping obligations include maintaining expressions of interest through the Internet that the contractor considered for a particular position, as well as applications and resumes. Contractors also are required to maintain, where possible, data about the race, sex, and ethnicity of applicants and Internet Applicants, as appropriate. The term Internet Applicant is defined in § 60-1.3 and generally means an individual who: (1) submitted an expression of interest in employment through the Internet; (2) is considered by the

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<sup>18</sup> Question and Answer 15 reads: "Q. What is meant by the terms "applicant" and "candidate" as they are used in the Uniform Guidelines? A: The precise definition of the term "applicant" depends upon the user's recruitment and selection procedures. The concept of an applicant is that of a person who has indicated an interest in being considered for hiring, promotion, or other employment opportunities. This interest might be expressed by completing an application form, or might be expressed orally, depending upon the employer's practice."

contractor for employment in a particular position; (3) possessed the basic qualifications for the position; and (4) did not remove himself or herself from consideration.

OFCCP has taken into account contractors' concerns about inviting self-identification for applications submitted electronically, particularly for those contractors who create resume databases which they mine for applicants when they have a job opening. In recognition of these concerns, and consistent with EO 13563's focus on simplifying and harmonizing requirements, OFCCP will permit contractors to invite applicants to self-identify as an individual with a disability at the same time as contractors collect the demographic data for applicants required under Executive Order 11246.

The Internet Applicant rule under EO 11246 generally allows contractors to do a "first cut" and screen out individuals whom they believe do not meet the basic qualifications of the position -- without capturing or retaining any demographic documentation on these individuals. There is the concern, however, that in doing this "first cut" contractors may be engaging in discrimination (e.g., if they are incorrectly applying their basic qualifications, or the basic qualifications have an adverse impact on a protected group and are not job-related and consistent with business necessity), and by not keeping the demographic information on the individuals they screened out they are eliminating evidence to prove that discrimination may be occurring. This concern is even greater in the section 503 context because these Executive Order "first cuts" are not designed to take into account the possibility that someone with a disability might be able to meet the qualification standard or perform the essential functions of the job with the provision of a reasonable accommodation.

Under existing law, it is unlawful under section 503 to use qualification standards, including at the “basic qualifications” screen stage, that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard is shown to be job-related for the position in question and consistent with business necessity. Selection criteria that concern an essential function may not be used to exclude an individual with a disability if that individual could satisfy the criteria with a reasonable accommodation. See § 60-741.21(a)(7). These requirements, therefore, apply when contractors design and implement their “basic qualifications” screens. In addition, after the initial screening for “basic qualifications,” contractors must also ensure that they are complying with their duty to evaluate all applicants for jobs based on the applicant’s ability to perform the essential functions of the job with or without reasonable accommodation.

OFCCP will treat the recordkeeping provisions of section 503 at § 60-741.80 in the same manner as the recordkeeping requirements under Executive Order 11246 at 41 CFR 60-1.12 as applied to Internet applicants. These recordkeeping requirements are not new and will impose no additional burden on contractors. The record retention requirements exist independently of whether and when individuals are invited to self identify under section 503.

The section 503 recordkeeping provisions require contractors to retain personnel or employment records made or kept by the contractor for one or two years depending on the size of the contractor and contract. Those records include the records contractors are required to maintain under 41 CFR 60-1.12. Section 60-1.12 requires contractors to maintain all expressions of interest through the Internet or related technologies

considered by the contractor for a particular position, such as on-line resumes or internal resume databases, and records identifying job seekers contacted regarding their interest in a particular position. For purposes of recordkeeping with respect to internal resume databases, the contractor also must maintain a record of each resume added to the database, a record of the date each resume was added to the database, the position for which each search of the database was made, and corresponding to each search, the substantive search criteria used and the date of the search. For purposes of recordkeeping with respect to external databases the contractor must maintain a record of the position for which each search of the database was made, and corresponding to each search, the substantive criteria used, the date of the search, and the resumes of job seekers who met the basic qualifications for the particular position who are considered by the contractor. As with records retained under EO 11246 regulations, these records are to be maintained regardless of whether the job seeker is an Internet applicant.

If a contractor has a practice of welcoming unsolicited resumes regardless of current job openings, OFCCP will permit the contractor to invite self-identification only of those considered for employment, consistent with requirements under Executive Order 11246 and its regulations at 41 CFR 60-1.3 and 60-1.12. The obligation to invite self-identification is triggered by considering the job seeker for employment, not by including the resume in the resume database. For example, if a contractor has an internal resume database with 1,000 resumes and is looking for applicants to fill a job as an engineer in Omaha, the contractor could limit the pool of resumes under review by applying a “basic qualifications” screen that identifies those who have a masters degree in electrical engineering, at least three years of experience as an electrical engineer, and further limit

the review to resumes submitted within the last three months. If that search produced a pool of 30 job seekers, the contractor might narrow the pool further by asking the 30 job seekers if they are interested in being considered for the job. If 10 job seekers indicate interest in being considered, they would be applicants and the contractor would invite the 10 job seekers to self-identify. In contrast, if a contractor has a practice of not accepting unsolicited resumes, job seekers who submit an unsolicited resume are not applicants. Accordingly, the contractor would have no obligation to invite them to self-identify as an individual with a disability.

It is also possible that potential and qualified job applicants with disabilities may not apply for jobs posted on contractors' online application systems because, for example, they are not aware that selection criteria concerning essential functions may not be used to exclude them if they can satisfy the criteria with a reasonable accommodation. Contractors seeking to fill jobs should seek to attract the best possible pool of applicants; this includes applicants with disabilities who could perform the job with or without reasonable accommodations. OFCCP notes that a best practice for ensuring a diverse, qualified pool of applicants for contractors using online application systems is posting a notice on their human resources webpage or online application portal that notifies job applicants that may need a reasonable accommodation to perform the functions of a job that they are entitled to one under the ADAAA. This best practice encourages qualified individuals with disabilities to pursue job vacancies, and provides contractors with access to a wide range of skills and talents.

In providing this guidance as to application of the self-identification requirement under section 503, contractors should be able to operate as they have been using their



existing systems and processes because this rule does not change how contractors handle Internet applicants. This should allow contractors to avoid creating separate data collection and storage systems as many contractors feared. For those contractors that need further help determining which individuals must be given a pre-offer self-identification inquiry, OFCCP is available to provide technical guidance.

- Paragraph (a)(1): Requirement that the contractor invite self-identification using the language and manner prescribed by the Director

Paragraph (a)(1) of the NPRM proposed requiring contractors to invite applicants to self-identify using language prescribed by the Director and provided a sample of what that language might look like for public comment. Several commenters responded, the majority of which expressed support for the proposed text, but suggested that modifications be made to it.

Commenters asserted that the proposed language was too long, wordy and complex. Many of these commenters offered suggestions to simplify the language, thereby increasing the likelihood that the invitation would be read, understood and responded to. Commenters also suggested that we state that self-identifying is “voluntary” before, rather than after, individuals are asked to identify their disability status. OFCCP agrees with these criticisms and is developing a form that will address them. When finalized, the form will be available on the OFCCP web site.

Some commenters opposed the use of uniform language for the self-identification invitation, arguing that uniform language will not allow contractors flexibility to modify the self-identification language as necessary based on geographic location. They recommended that we provide a framework with suggested language and allow

contractors the flexibility to design invitations they believed would maximize response rates. Other commenters expressed a willingness to use self-identification language prescribed by OFCCP, but only if the EEOC has approved the inquiry. As noted in the NPRM, OFCCP believes that the use of uniform language is needed to ensure consistency in all self-identification invitations, and to reassure individuals with disabilities that the self-identification request is routine and executed pursuant to obligations created by OFCCP. Standardized language will also minimize any burden to contractors associated with this responsibility, and will facilitate contractor compliance. With respect to the concern about EEOC approval, pursuant to the rulemaking process, both the NPRM and this final rule were coordinated with EEOC, among other agencies, prior to their publication. EEOC will be asked for input in the process that Secretary uses to finalize the form.

Finally, few commenters commented on the portion of the text inviting applicants to request any needed accommodation in the application process. Those who did suggested that we either separate language concerning reasonable accommodation from the invitation, or include clarification that applicants are not being asked to disclose accommodations they need to perform the job they are seeking. We will address this issue when finalizing the language of the form.

- Paragraph (b): Post-Offer Invitation to Self-identify

Paragraph (b) of the NPRM proposed modifying, but retaining, the current rule's requirement that contractors invite individuals, after an offer of employment is extended, but before the applicant begins work, to voluntarily self-identify as an individual with a disability. As explained in the NPRM, we proposed to retain this requirement, in

addition to the new pre-offer invitation requirement, so that individuals with hidden disabilities who fear potential discrimination if their disability is revealed prior to receiving a job offer will, nevertheless, have the opportunity to provide this valuable data. We received no comments on this paragraph. Accordingly, the language in the NPRM is adopted as proposed.

- Paragraph (c): Annual Employee Survey

Paragraph (c) proposed requiring that, on an annual basis, contractors invite all of their employees to voluntarily and anonymously self-identify as having a disability using the language and manner prescribed by the Director.

We received several comments that addressed whether the annual employee survey should be anonymous. Some of these commenters generally supported an anonymous survey. These commenters asserted that having the survey be anonymous would permit contractors to collect the data necessary to evaluate the effectiveness of their affirmative action efforts while ensuring that applicants and employees with disabilities are protected from discrimination. Others contended that an anonymous survey would be critical to increasing the likelihood that individuals would choose to self-identify.

Several other commenters opposed the anonymity requirement, arguing that it would impede the ability of contractors to comply with the NPRM's proposed requirements for collecting and analyzing data regarding individuals with disabilities. These commenters pointed out that contractors would be unable to comply with the goal requirement of proposed § 60-741.46 to determine their utilization of individuals with disabilities by job group from anonymous self-identification forms. Such assessments would require an individual's name and other identifying information. Moreover,

without identifying information, it would not be possible for contractors to know whether any of the employees who self-identified had self-identified previously, leading to the possibility of double counting employees with disabilities.

OFCCP agrees that identifying information is needed in order for contractors to assess their utilization of individuals with disabilities by job group. We have, accordingly, revised paragraph (c) to remove the word “anonymous.” However, as noted previously, disability demographic information must be kept strictly confidential, apart from regular personnel files. We have also recaptioned paragraph (c) as “Employees” and removed the word “survey.” This clarifies that contractors are to provide employees with the same invitation to voluntarily self-identify as an individual with a disability that is provided to applicants, and do not need to canvass their employees in some other fashion.

Divergent views were also expressed by commenters regarding the proposal to invite employees to voluntarily self-identify on an annual basis. Commenters supporting the annual requirement contended that it would provide an opportunity for employees who have become disabled since employment, or who were hesitant to self-identify during the hiring process, to be counted for affirmative action purposes. They also asserted that an annual employee survey would provide contractors with current information and enable them to measure the impact of changes in their hiring and employment practices.

Commenters opposed to the annual survey requirement contended that it would be superfluous in light of the requirement in the existing regulations for contractors to advise employees of their right to self-identify at any time. They also argued that it is redundant

to require contractors to survey all employees annually in addition to the pre- and post-offer invitations to self-identify. These commenters argued that a single solicitation of applicants post-offer would be more appropriate, and would provide an opportunity for interactive discussions about reasonable accommodation. Other commenters opposed to the annual survey asserted that the inclusion of individuals who become disabled after becoming employed would not help contractors in analyzing and improving recruiting and outreach efforts. These commenters also contended the annual survey would deter employees from participating in the interactive reasonable accommodation process, and make employees suspicious of management's persistence in asking them to identify their disability status, making them less likely to self-identify.

Finally, some commenters opposed to the annual employee survey proposed alternative ways to achieve the desired result. For example, one commenter recommended that we allow the contractor to post the invitation to self-identify in a conspicuous location and allow employees to self-identify at any time, rather than once per year, and require the contractor to record the data annually. Another proposal was to reduce the frequency of the survey to every two or three years instead of annually, or to make the annual survey optional, rather than mandatory.

As stated in the NPRM, because baseline data regarding the number of individuals with disabilities in the contractor's workforce is not available, it is important to provide all employees with an initial opportunity to self-identify. It is also important that contractors continue to have the most accurate data possible in order to be able to conduct meaningful self-assessments of their employment practices and recruitment efforts. This is especially important in the disability context because the status of employees may change over time

and the snapshot of the makeup of the contractor's workforce may become outdated for planning and self-assessment purposes. In light of both the importance of employee data and the concerns raised by commenters, the final rule revises the requirement to invite employee self-identification as follows: the contractor is to invite employee self-identification during the first year it becomes subject to the requirements of this section, and at five year intervals, thereafter. At least once during the years between each invitation, the contractor must remind their employees that they may voluntarily update their disability status at any time.

- Paragraph (d): Prohibits contractor from compelling or coercing individuals to self-identify

Proposed paragraph (d) emphasized that the contractor is prohibited from compelling or coercing individuals to self-identify. While a majority of commenters supported this proposal, a few commenters opposed it. Commenters opposing this paragraph argued that the adoption of any utilization goal should be predicated upon mandatory self-identification for applicants and employees to eliminate inaccurate reporting.

The language of the NPRM is adopted into the final rule as proposed. OFCCP notes that self-identification for affirmative action purposes has always been voluntary under section 503, and is, likewise, voluntary with regard to race, gender, and ethnicity under Executive Order 11246, which OFCCP also enforces. While the final rule adds a goal requirement to section 503 for the first time, we find this an insufficient reason to mandate self-identification by applicants and employees. Executive Order 11246 has long had a goal requirement, but has never mandated self-reporting by applicants or

employees. Moreover, such a mandate would be virtually unenforceable as many disabilities are hidden and would not be known to the contractor. In addition, as previously discussed, OFCCP will permit contractors to identify as individuals with disabilities applicants and employees with known or obvious disabilities who decline to voluntarily self-identify. Permitting such identification by contractors for affirmative action purposes, we believe, adequately addresses the concerns of commenters seeking a mandatory self-identification requirement. OFCCP, therefore, adopts paragraph (d) into the final rule as proposed.

- Paragraph (e): Requirement that information concerning disability be kept confidential

Proposed paragraph (e) emphasized that all information regarding self-identification as an individual with a disability shall be kept confidential and maintained in a data analysis file in accordance with § 60-741.23 of this part.

Some commenters offered recommendations to modify paragraph (e). Commenters suggested that a clear definition of what constitutes a “data analysis file” be provided and include clarification regarding who may have access to the information in such a file. It was also suggested that OFCCP expand the language of paragraph (e) to state that self-identification information should not be placed in an individual’s personnel file. Still others suggested that self-identification information should be kept in the confidential medical file required by the ADA and the Genetic Information Nondiscrimination Act (GINA), and the implementing regulations for those statutes. OFCCP believes that paragraph (e) is sufficiently descriptive to instruct contractors to maintain self-identification information in a single confidential file maintained solely for

the purpose of conducting data analysis required by section 503 and this part, and that a definition of “data analysis file” is not necessary. As section 503 already prohibits the maintenance of disability-related information in personnel files, there is no need to so state in this paragraph. See 41 CFR 60-741.23(d). Lastly, OFCCP rejects the suggestion that contractors be permitted to maintain self-identification information in employees’ individual confidential medical files. This would impede contractors’ ability to use the data for the collective analysis for which the data are collected, and to provide the self-identification information to OFCCP when requested to do so.

#### Section 60-741.44 Required contents of affirmative action programs

The proposed rule contained significant revisions to several paragraphs of this section. These proposals, the comments to these proposals, and the revisions made to the final rule are discussed below.

A total of 133 comments addressed the required contents of a section 503 affirmative action program (AAP). Commenters included disability, employer, veterans and other groups and associations, contractors, law firms, government offices, and individuals.

- Paragraph (a): Affirmative action policy statement

Proposed § 60-741.44(a) requires contractors to state their equal employment opportunity policy in the company’s AAP. The NPRM proposed revising the second sentence of the existing paragraph to clarify the contractor’s duty to provide notice of employee rights and contractor obligations in a manner that is accessible and understandable to persons with disabilities. It also proposed revising the parenthetical at



the end of the sentence, replacing the outdated suggestion of “hav[ing] the notice read to a visually disabled individual” as an accommodation with the suggestion to provide Braille, large print, or other versions of the notice that allow persons with disabilities to read the notice themselves. The NPRM also proposed revising paragraph (a) to require the contractor’s chief executive officer to clearly articulate his or her support for the company’s AAP in the policy statement.

OFCCP received sixteen comments on these proposed revisions, most of which supported the changes. Commenters noted that the requirement for contractors to provide accommodations such as large print, Braille and other means to enable individuals with visual impairments to read for themselves brings the regulation in line with current practice under the ADA and Rehabilitation Act.

An employer association questioned the feasibility of obtaining the required notice in Braille. This comment also stated that the proposed requirement would impose an insurmountable burden because providing notices that are understandable to an individual with a disability requires identification, understanding, and anticipation of the varying types and degrees of learning disabilities that individuals may possess.

OFCCP declines to revise § 60-741.44(a) with regard to the provision of alternative formats that are accessible and understandable to persons with disabilities. The proposed wording indicates that the listed alternative formats are simply examples of reasonable accommodation that may be needed by particular individuals; there may be other ways to comply with this requirement, depending on the specific circumstances. With regard to the concern that there may be varying types and degrees of learning disabilities requiring accommodation, OFCCP notes that paragraph (a) is consistent with the existing section 503 reasonable accommodation obligation that requires contractors to

accommodate the specific limitations of their applicants and employees with disabilities, unless to do so would impose an undue hardship on its operations. See 41 CFR 60-741.21(f).

OFCCP, however, agrees with commenters' suggestion to revise the language of paragraph (a) to clarify the level of company leadership that must demonstrate their support for the company's AAP. The purpose of this paragraph is to ensure that the statement of policy communicates to employees that support for the AAP goes to the very top of the contractor's organization. For contractors with foreign-based parent companies, it is appropriate to require the company leadership that is based in the United States to express that support. Therefore, § 60-741.44(a) of the final rule is revised to state "[t]he policy statement shall indicate the top United States executive's (such as the Chief Executive Officer or the President of the United States Division of a foreign company) support for the contractor's affirmative action program ..."

- Paragraph (b): Review of personnel processes

The NPRM proposed three changes to this paragraph. First, it required that the contractor review its personnel processes on at least an annual basis, rather than "periodically," to ensure that its obligations are being met.

Second, proposed paragraph (b) mandated certain specific steps (based on existing Appendix C) that the contractor must take, at a minimum, in the review of its personnel processes, including: (1) identifying the vacancies and training programs for which protected applicants and employees were considered; (2) providing a statement of reasons explaining the circumstances for rejecting individuals with disabilities for vacancies and training programs and a description of considered accommodations; and

(3) describing the nature and type of accommodations for individuals with disabilities who were selected for hire, promotion, or training programs.

Third, the NPRM proposed to require that the contractor “ensure that its use of information and communication technology is accessible to applicants and employees with disabilities.” A footnote citing resources related to technological accessibility, such as the Web Content Accessibility Guidelines (WCAG 2.0) and the regulations implementing the accessibility requirements for Federal agencies prescribed in section 508 of the Rehabilitation Act was also included.

OFCCP received 56 comments regarding these proposals. Some supported an annual review of personnel processes, while other commenters suggested a less frequent review, occurring every three or five years, would be sufficient. Several comments asserted that significant burden and costs would result from the proposed requirement, much greater than that calculated by OFCCP in the NPRM’s Regulatory Procedures section. The comments also asserted that promotion and training opportunities, unlike hiring, are not as readily distinguishable for individual candidates. Such opportunities may be available to all employees, take a number of different forms, and may be noncompetitive. These commenters further objected to the requirement to create and maintain a statement of reasons for every instance in which an individual with a disability is denied a position or training as tantamount to requiring a drafted legal defense before any claims were brought, and warned that it could serve to “drive underground” the real reason for rejection. Lastly, the comments raised confidentiality concerns and cited difficulties the proposed requirement would create in terms of recordkeeping and access to human resource information systems currently used by contractors. The comments

asserted that it would therefore be unreasonable to make the proposed procedures mandatory.

Based on the comments submitted, and questions about the efficacy of these requirements toward the end of increasing employment opportunities for individuals with disabilities, OFCCP does not adopt the proposal as drafted in the NPRM. Instead, the final rule retains the language in existing § 60-741.44(b) that contractors shall review their personnel processes “periodically,” but eliminates existing Appendix C. However, in so doing, OFCCP reiterates that existing paragraph (b) contains several requirements – including ensuring that its personnel processes are careful, thorough, and systematic; ensuring that these processes do not stereotype individuals with disabilities; and designing procedures that facilitate a review of the implementation of these requirements – that continue to apply to contractors. OFCCP will vigorously enforce these requirements.

With respect to the proposed technological accessibility requirement, some disability advocacy groups supported the proposed requirement. However, other commenters asserted that this requirement was too vague, and asked for clarification as to what they would have to do to comply and how OFCCP intended to enforce it. These commenters also asserted that there is not a single, accepted standard of “accessibility,” that technology is constantly changing, and that it could be tremendously expensive and time-consuming for contractors to have to ensure on an annual basis that all of its information and communication technology are fully accessible and technologically up-to-date.

In response to these comments OFCCP has revised and clarified paragraph (b) in the final rule. It requires that the “contractor shall ensure” that applicants and employees with disabilities have “equal access to its personnel processes, including those implemented through information and communication technologies.” The final rule requires, further, that contractors must provide “necessary reasonable accommodation to ensure applicants and employees with disabilities receive equal employment opportunity in the operation of personnel processes.” Contractors are also “encouraged” to make their information and communication systems accessible, even in the absence of a specific accommodation request. To assist contractors in making their systems accessible, the final rule retains the footnote highlighting the Web Content Accessibility Guidelines (WCAG 2.0) and the regulations implementing the Federal sector accessibility requirements of section 508 of the Rehabilitation Act as examples of readily available accessibility resources.

- Paragraph (c): Physical and mental qualifications

The NPRM proposed three substantive revisions to this paragraph. First, it required that all physical and mental job qualification standards must be reviewed and updated, as necessary, on an annual, as opposed to a “periodic,” basis. Second, paragraph (c)(1) of the NPRM required the contractor to document its annual review of physical and mental job qualification standards. Third, paragraph (c)(3) of the NPRM required the contractor to timely document those instances in which it believes that an individual would constitute a “direct threat” as understood under the ADA and defined in these regulations, and to maintain this document as set forth in the recordkeeping requirements in § 60-741.80.

OFCCP received 37 comments addressing the proposal to require annual reviews of physical and mental job qualification standards. Comments from disability and other associations, as well as a few law firms, supported the annual review requirement. Some of these commenters stated that all qualifications that needlessly screen out people with disabilities should be reviewed including such qualifications as having a driver's license. Contrasting comments from contractors, employer associations, and other law firms stated that the requirement to review physical and mental qualifications of all jobs with openings during the AAP period would be burdensome because of the number of job openings, variety of jobs, time, staff and needed changes to HR systems. Several comments suggested less burdensome approaches. Most of these comments suggested reviewing the qualifications only when it is a new position or a significant change in the job occurs. Other commenters suggested that reviews occur on a three or five year basis.

With regard to the second proposed change in paragraph (c)(1) requiring that the contractor document its job qualification standard reviews, commenters questioned what evidence will be necessary to demonstrate that a review has been completed, including whether a job analysis and validation are needed. One of these comments noted that the proposed regulation lacks clarity as to how job-relatedness is evidenced and asserted that the ADA practice of examining "essential functions" of a job should be sufficient.

Finally, the third proposed change requires the contractor to timely document those instances in which it believes that an individual would constitute a "direct threat." Comments on this proposal were limited. One comment asserted that this proposed requirement would be burdensome and other comments expressed concern that contractors may become overzealous in documenting incidents involving persons with

disabilities. In contrast, another commenter stated that documentation should be subject to disclosure to the individual.

We note at the outset that the existing regulation clearly prohibits the contractor from using a job qualification standard that screens out or tends to screen out an individual or class of individuals on the basis of disability unless the standard is job-related and consistent with business necessity. See 41 CFR 60-741.21(g), 60-741.44(c)(2). This is a primary reason that the existing regulations require the contractor to periodically review its physical and mental job qualification standards. To the extent that contractors are not currently conducting these reviews at all, they are already in violation of the existing regulations.

With this in mind, and taking into account commenters' concerns about the burden associated with the proposal, the final rule does not adopt the proposal as drafted in the NPRM. Instead, the final rule retains the language in existing § 60-741.44(c), requiring that contractors adhere to a schedule for the “periodic review of all physical and mental job qualification standards,” and providing that contractors have the burden to demonstrate that qualification standards that tend to screen out qualified individuals with disabilities are job-related and consistent with business necessity. The burden analysis in the Regulatory Procedures section of the final rule has been amended accordingly.

- Paragraph (d): Reasonable accommodation to physical and mental limitations.

The NPRM proposed a single revision to this provision of the regulations. The proposed change required the contractor to ensure that its electronic or online job application systems are compatible with assistive technology commonly used by individuals with disabilities, such as screen reading and speech recognition software.

Thirteen comments were received on this proposed change. One of these comments asserted that OFCCP should require adoption of a universal design approach or of a regulatory scheme such as section 508. Commenters who opposed the requirement spoke to the potential burden the requirement would impose. One comment submitted by an employer association asserted that OFCCP's proposed change is premature and pointed out that the Department of Justice and the Access Board are currently examining requiring website and technology accessibility and the availability of processes or technology to facilitate such access.

OFCCP has revised and clarified this requirement in the final rule, and determined that, as revised, this obligation is more appropriately addressed in § 60-741.21(a)(6)(iii) as part of the fundamental, nondiscrimination reasonable accommodation obligation of all contractors subject to section 503. This revised provision makes clear that the reasonable accommodation obligation extends to contractors' "use of electronic or online application systems." A contractor using such a system must provide necessary reasonable accommodation to "ensure" that qualified individuals with disabilities who are unable to fully utilize the system are provided "equal opportunity to apply and be considered for all jobs."

- Paragraph (f): Outreach and recruitment efforts

Existing paragraph (f) requires contractors to engage in outreach and recruitment of individuals with disabilities and suggests a number of outreach and recruitment efforts that the contractor could undertake to comply with this obligation. The NPRM proposed several changes to this paragraph: proposed paragraph (f)(1)(i) required that contractors promptly list all of their employment opportunities, with limited exceptions, with the



nearest Employment One-Stop Career Center; paragraph (f)(1)(ii) required that the contractor enter into three linkage agreements with various entities to serve as sources of potential applicants with disabilities; paragraph (f)(2) included a list of additional suggested outreach and recruitment efforts that contractors could take; paragraph (f)(3) proposed a new requirement that the contractor conduct an annual self-assessment of their outreach and recruitment efforts; and paragraph (f)(4) clarified the contractor's recordkeeping obligations with regard to these outreach and recruitment efforts.

Overall, OFCCP received 112 comments on the proposed changes to § 60-741.44(f). While a number of commenters praised OFCCP's efforts to strengthen Federal contractors' recruitment and outreach efforts, the majority of the comments expressed concerns about the proposed requirements. Commenters raised a variety of issues, including concerns about the burden associated with the proposed mandatory requirements, technical questions regarding the drafting of the proposed rule language, and the utility of some of the recommended provisions. We address the proposals in each subparagraph, and the comments to these proposals, in turn below.

Commenters voiced several concerns with the (f)(1)(i) proposed requirement that contractors promptly list all of their employment opportunities with the nearest Employment One-Stop Career Center. Commenters stated that the requirement to provide information about each job vacancy in the manner and format required by the appropriate One-Stop would be extremely burdensome because the One-Stops have a wide variety of different manners of submission and required formats. Some commenters suggested that OFCCP should establish a uniform format and manner for job listings or reestablish the national "job bank" that previously existed under VEVRAA.

As stated above, paragraph (f)(1)(ii) required contractors to enter into three linkage agreements with three different entities: specifically, the proposal required linkage agreements with (1) the State Vocational Rehabilitation Agency nearest the contractor's establishment or a local organization listed in the Social Security Administration's Ticket to Work Employment Network Directory; (2) at least one of several other listed organizations and agencies for purposes of recruitment and developing training opportunities; and (3) an organization listed in the Employer Resources section of the National Resource Directory (NRD), an online collaboration among the Departments of Labor, Defense, and Veterans Affairs. Commenters expressed concern about the administrative and financial burden related to the linkage agreement requirement. Several commenters also opined that requiring contractors to have three linkage agreements per establishment could result in a Federal contractor with multiple establishments having to enter into hundreds of linkage agreements. Commenters also questioned the capacity of some of the organizations mentioned in the proposed rule to enter into a significant number of linkage agreements with contractors. Additionally, we received comments from contractors that were already party to linkage agreements with various groups. These commenters asked whether they would need to enter into three additional linkage agreements, or if their existing agreements could be used to satisfy the requirement. Some commenters stated that contractors should be allowed the flexibility to develop relationships with potential resource organizations that may better meet their needs but that were not among those listed in the NPRM. Finally, many commenters suggested adding other specific recruitment sources to those listed in the NPRM or on the NRD, such as State developmental disability, and mental health agencies. These

commenters also suggested that the NPRM's reference to career offices of educational institutions and private recruitment sources be revised to specify that these be offices and recruitment sources that "specialize in the placement of individuals with disabilities."

In light of these comments, and in order to reduce the burden on contractors, the final rule does not incorporate the proposal to mandate contractors' listing of employment opportunities with the One Stop Career Centers. Additionally, the final rule does not incorporate the proposal to require contractors to enter into linkage agreements. Rather, the final rule retains the existing language of § 60-741.44(f)(1)(i) which requires the contractor to undertake "appropriate outreach and positive recruitment activities," and provides a number of suggested resources, in paragraph (f)(2)(i), that contractors may utilize to carry out this general outreach and recruitment obligation. The final rule also includes, as suggested resources, the Employment One-Stop Career Centers (One-Stops) and American Job Centers, State mental health agencies, and State developmental disability agencies. Additionally, language was added to the recommended resources of "placement or career offices of educational institutions" and "private recruitment sources, such as professional organizations or employment placement services" to clarify that these should be resources "that specialize in the placement of individuals with disabilities."

The final rule's approach requires contractors to engage in outreach and recruitment efforts, but allows each individual contractor the flexibility to choose the specific resources they believe will be most helpful in identifying and attracting protected individuals with disabilities, given their particular needs and circumstances. It will also

enhance contractors' capability to switch between and among different resources in order to find and maintain the resource "mix" that is most effective.

Lastly with regard to paragraph (f)(1), several commenters argued that OFCCP underestimated the burden hours associated with complying with the proposed paragraph (f)(1)(iii) (paragraph (f)(1)(ii) in the final rule), which requires the contractor to send written notification of company policy related to its affirmative action efforts to all subcontractors, including subcontracting vendors and suppliers. OFCCP retains this requirement as proposed, as we believe it is crucial to effective implementation and enforcement of the regulations that subcontractors are aware of their section 503 affirmative action obligations. A discussion of commenters' concerns regarding the burden of compliance with this requirement is found in the Regulatory Procedures section of this final rule.

OFCCP received several comments regarding proposed paragraph (f)(2), which set forth additional suggested outreach efforts that contractors could engage in to increase the effectiveness of its recruitment efforts. These comments centered on paragraph (f)(2)(vi), which stated that contractors, in making hiring decisions, "shall" consider applicants who are known individuals with disabilities for all available positions for which they may be qualified when the position(s) applied for is unavailable. Commenters indicated that despite paragraph (f)(2)'s language that it contains "suggested outreach efforts," the word "shall" suggested that the contents of paragraph (f)(2)(vi) were mandatory. The use of "shall" in this paragraph was an inadvertent error in the NPRM. The content of proposed paragraph (f)(2) appears in paragraph (f)(2)(ii) of the final rule. The content of proposed (f)(2)(vi) appears in paragraph (f)(2)(ii)(F) of the

final rule, revised to state that contractors “should consider applicants...” We also note that this suggested activity is intended to be a limited one. Contractors who choose to consider individuals with disabilities for jobs other than those for which they applied may exercise discretion to limit this consideration based on geography, the qualifications of the applicant, and other factors. Contractors may also exercise discretion with respect to the time period for which they will consider applicants for other positions. This provision is intended to be flexible and is not required of contractors.

Paragraph (f)(3) of the NPRM proposed to require the contractor, on an annual basis, to review the outreach and recruitment efforts it has undertaken over the previous twelve months and evaluate their effectiveness in identifying and recruiting individuals with disabilities, and document its review. Some commenters supported the proposed requirement, some suggested less frequent review, and others opposed this proposed requirement. Several commenters expressed concern about the utility of the suggested metrics for analyzing external outreach and recruitment efforts. One commenter stated that if the only standard used for assessing outreach and recruitment is the number of individuals with disabilities who are hired, the proposed rule would effectively become a quota system for hiring individuals with disabilities. Another commenter questioned whether overall hiring statistics would provide much useful information about the effectiveness of specific outreach efforts. Commenters also expressed concerns about the requirement to analyze hiring data for the current year as well as the previous two years. Commenters argued that the most recent year is the most relevant year in measuring effectiveness of affirmative action efforts. Finally, commenters also questioned OFCCP’s calculation of the cost of compliance with this provision.

OFCCP declines to make changes to the proposed paragraph (f)(3). The purpose of the mandated self-assessment is to ensure that the contractor thinks critically about its recruitment and outreach efforts, and modifies its efforts as needed to ensure that its obligations are being met. OFCCP disagrees that the number of individuals with disabilities who are hired is the “only” standard for analyzing the effectiveness of outreach efforts. The proposed rule made clear that the number of individuals with disabilities who are hired is to be a primary factor considered, given section 503’s stated purpose to “employ and advance in employment” individuals with disabilities, but is not the only metric for contractors to use for analyzing the effectiveness of external outreach and recruitment efforts. Rather, as stated in the NPRM, the regulation requires the contractor to consider all the metrics required by § 60-741.44(k) (which includes both applicant and hiring data), and also clearly allows the contractor to consider any other criteria, including factors that are unique to a particular contractor, in determining the effectiveness of its outreach, so long as the criteria are reasonable and documented by the contractor so that OFCCP compliance officers can understand the rationale behind the contractor’s self-assessment and the conclusions reached. OFCCP believes that this self-assessment is crucial to the contractor’s section 503 affirmative action obligations, and that the final rule provides the contractor a significant amount of flexibility in meeting this requirement.

With regard to the lengthened timeframe of applicant and hire data that the contractor must consider when evaluating its outreach efforts, OFCCP notes that in response to comments, it has reduced this time period from 5 years to 3 years. As explained in the NPRM, the purpose of requiring consideration of additional data for the

self-assessment is to provide more complete information with which a contractor can assess the effectiveness of its outreach and recruitment efforts over time. In short, the additional information will enable the contractor and OFCCP to more accurately review outreach and recruitment efforts to ensure that the affirmative action obligations of paragraph (f) are satisfied. Accordingly, we retain paragraph (f)(3) in the final rule as proposed in the NPRM. The comments regarding the burden imposed by this provision, including a revised calculation of its cost, can be found in the Regulatory Procedures section of this final rule.

The final rule makes one minor change to the second to last sentence in paragraph (f)(3). As explained in the preamble to the NPRM, OFCCP proposed that the contractor's conclusion as to the effectiveness of its outreach efforts "shall be reasonable as determined by OFCCP in light of these regulations." The final rule replaces the word "shall" with "must," which more clearly describes the requirement.

- Paragraph (g): Internal dissemination of affirmative action policy

Paragraph (g) of the existing rule requires contractors to develop internal procedures to communicate to employees their obligation to engage in affirmative action efforts to employ and advance in employment qualified individuals with disabilities. The NPRM proposed requiring the contractor to undertake many specific actions that are only suggested in the existing rule, including incorporating the affirmative action policy in company policy manuals, discussing the affirmative action policy during management training programs to ensure they are informed about the contractor's obligations, and if the contractor is a party to a collective bargaining agreement, meeting with union officials and employee representatives to inform them of the policy and ask for their

cooperation. OFCCP received nine comments regarding § 60-741.44(g), including comments from a disability association, employer associations, contractors, and a law firm.

Several of these comments supported the proposed requirement, while others sought some clarification, and still others indicated that the requirement imposed an unnecessary burden.

Some commenters requested alternative options to including the affirmative action policy in the contractor's policy manual pursuant to the proposed 60-741.44(g)(2)(i). One commenter suggested instead, for example, that contractors be permitted to post the policy on the company's intranet where similar human resources and EEO pronouncements are found. One comment requested that OFCCP clarify how contractors could post their policy in the absence of having a policy manual.

The final rule adopts the proposed language in § 60-741.44(g)(1) without change. This paragraph sets out the general requirement that contractors internally disseminate their affirmative action policy and explains the reasons for the requirement. It clearly states that the procedures for internally disseminating affirmative action policies "shall be designed to foster understanding, acceptance and support among the contractor's executive, management, supervisory and other employees and to encourage such persons to take the necessary actions to aid the contractor in meeting this obligation."

The remainder of paragraph (g) is streamlined and revised in the final rule to ease the burden on contractors, while ensuring that contractors must communicate their affirmative action obligations and policies internally. Two of the three actions the NPRM



proposed in paragraph (g)(2) are maintained as requirements in paragraph (g)(2) of the final rule: (1) including the policy in the contractor's policy manual; and (2) informing union officials of the policy and requesting their cooperation, if the contractor is party to a collective bargaining agreement. However, these requirements are modified slightly, based on the comments received. The first has been modified to allow contractors to include the affirmative action policy either in the contractor's policy manual, or to "otherwise make the policy available to employees." We believe that most companies generally have some form of document that provides guidance on human resources policies and procedures – either a policy manual, employee handbook, or similar document– that is available to employees that is an appropriate place to put the policy. OFCCP believes including the affirmative action policy in these documents will enhance the visibility of the contractor's commitment to individuals with disabilities. However, the final rule also allows contractors the flexibility to make the policy available to its employees through other means. This could include posting the policy on a company intranet, but this will only fulfill the requirement if all employees have access to this intranet. The second requirement, regarding informing union officials, is modified for consistency and clarity to reflect the requirement in § 60-741.5(a)(5) that the contractor "notify" union officials of its policy.

The remaining elements that were required in the NPRM or suggested in the existing rule now appear in paragraph (g)(3) of the final rule as actions that the contractor is "encouraged" to take. The recordkeeping provision that was in proposed paragraph (g)(3) is eliminated in the final rule. We note, however, that to the extent any activities undertaken pursuant to paragraph (g) involve the creation of records, they are subject to

the general recordkeeping requirement of § 60-741.80 and contractors will be required to maintain such documents as specified by § 60-741.80.

- Paragraph (h): Audit and reporting system for affirmative action program

Paragraph (h) of the existing rule outlines the contractor's responsibility to design and implement an audit and reporting system for the company's AAP. It also requires, in paragraph (h)(2), that contractors undertake necessary action to bring deficient programs into compliance. The NPRM proposed a new requirement that contractors document the actions taken to comply with paragraph (h). The NPRM also proposed that contractors maintain the records of their documentation subject to the recordkeeping requirements of § 60-741.80. OFCCP received nine comments on this provision. Of these, seven asserted that the proposed recordkeeping requirement would be burdensome and require the development of new processes, while two supported this requirement recognizing the need for and benefits of self-audits.

This section is adopted into the final rule as proposed. The section requires the contractor to measure the effectiveness of its affirmative action program, indicate any need for remedial action, determine the degree to which the contractor's objectives have been attained, determine whether individuals with disabilities have had the opportunity to participate in all company professional and social activities, and measure the contractor's compliance with the affirmative action program's specific obligations. OFCCP believes that the proper conduct of the analysis required in paragraph (h) will necessitate the creation of documentation. Paragraph (h)(1)(vi) makes this expectation clear by requiring that the contractor document the actions it takes to comply with self-audit requirements of paragraph (h)(i). Contractors are further required to maintain this

documentation in accordance with the recordkeeping requirements of § 60-741.80.

OFCCP believes that this requirement will allow for a more effective assessment, by contractors and by OFCCP, of whether the contractor is meeting its affirmative action obligations, including whether deficiencies have been identified and corrected.

- Paragraph (i): Responsibility for implementation

The NPRM proposed to modify existing paragraph (i) to require that the identity of the official responsible for a contractor's affirmative action activities appear on all internal and external communications regarding the contractor's affirmative action program. Upon further review, OFCCP does not believe that the benefit of this suggested change outweighs the potential burden that it would place on contractors. Accordingly, the final rule restores the text of the existing regulation, which states that the identity of the official responsible for a contractor's affirmative action activities "should" appear in all communications about the contractor's affirmative action program.

- Paragraph (j): Training

Paragraph (j) of the existing regulation requires that the contractor train "[a]ll personnel involved in the recruitment, screening, selection, promotion, disciplinary and related processes... to ensure that the commitments in the contractor's affirmative action program are implemented." The NPRM proposed revising this paragraph to specify topics required to be included in this training, including: the business and societal benefits of employing individuals with disabilities; appropriate sensitivity toward recruits, applicants, and employees with disabilities; and the legal responsibilities of the contractor and its agents regarding individuals with disabilities, including the obligation to provide reasonable accommodation to qualified individuals with disabilities. The

NPRM also proposed requiring the contractor to record which of its personnel receive this training, when they receive it, and the person(s) who administered the training, and to maintain these records, along with all written or electronic training materials used, pursuant to the recordkeeping requirements of § 60-741.80.

OFCCP received 15 comments from disability and employer associations, contractors, and a law firm. Approximately half of the comments supported the proposed requirements, while the others opposed it. These latter comments raised concerns regarding the burden that training requirements place on contractors and the manner in which OFCCP calculated it. One comment noted specific concerns about what constitutes “sensitivity” training. Several commenters suggested that OFCCP develop a model training for contractors to use, instead of the contractor having to create additional training to what it currently provides.

In light of these concerns, and balancing the utility of the proposal against the burden that it would create for contractors, the final rule does not incorporate the NPRM proposal requiring specific training topics and the maintenance of all training materials pursuant to § 60-741.80. Instead, the final rule retains the existing rule’s general requirement that “[a]ll personnel involved in the recruitment, screening, selection, promotion, disciplinary, and related processes” must be trained to ensure that the contractor’s affirmative action commitments are implemented. However, we note that documents created by the contractor in connection with activities undertaken pursuant to paragraph (j) are subject to the general recordkeeping requirement of § 60-741.80.

- Paragraph (k): Data Collection Analysis

The proposed regulation added paragraph (k) to the rule, proposing to require that

the contractor document and update annually the following information: (1) for referral data, the number of referrals of individuals with disabilities received from entities with which the contractor has a linkage agreement and the number of referrals of individuals with disabilities received from employment service delivery systems; (2) for applicant data, the total number of applicants for employment, the number of applicants who are known individuals with disabilities, and the “applicant ratio” of known individuals with disabilities who are applicants to total applicants; (3) for hiring data, the total number of job openings, the number of jobs filled, the number of known individuals with disabilities hired, and the “hiring ratio” of known individuals with disabilities to total hires; and (4) the total number of job openings, the number of jobs that are filled, and the “job fill ratio” of job openings to job openings filled.

The NPRM stated that OFCCP is also considering adding a reporting requirement, and invited public comment on this option. Under this proposal, contractors would be required to provide OFCCP with a report containing the measurements and computations required by proposed paragraph (k), including the percentage of applicants, new hires, and total workforce for each EEO-1 category. The report would be provided to OFCCP on an annual basis, regardless of whether the contractor has been selected for a compliance evaluation.

As stated in the NPRM, the impetus behind this new section is that no structured data regarding the number of individuals with disabilities who are referred for or apply for jobs with Federal contractors is currently maintained. This absence of data makes it nearly impossible for the contractor and OFCCP to perform even rudimentary evaluations of the availability of individuals with disabilities in the workforce, or to make any sort of

objective, data-based assessments of how effective contractor outreach and recruitment efforts have been in attracting individuals with disabilities as candidates. Maintaining this information will provide meaningful data to assist the contractor in evaluating and tailoring its recruitment and outreach efforts.

OFCCP received a total of 80 comments from disability, contractor and other associations, law firms, government offices, contractors, and individuals. Disability and other associations, and some contractors and individuals that commented supported the required data collection and the objectives behind it. The contractor community, by and large, opposed the proposal on varying grounds, including: concerns regarding the integrity of the data to be collected (particularly data on referrals); assertions that some of the data conflicts with the Internet Applicant Rule in the Executive Order regulations; and assertions that collecting, analyzing, and maintaining the data would be unduly burdensome. Several commenters from the construction and transportation industries asserted that they should be exempt from the requirement due to the unique nature of their respective industries. Finally, a number of commenters sought clarification of some of the processes set forth in paragraph (k). These issues are addressed below.

Several comments articulated data integrity concerns regarding the data to be used in calculating the referral ratio. Commenters characterized the state employment service delivery systems as “self-service,” leaving source identification to the job candidates, thus making referral data unreliable and not meaningful. Examples were provided indicating that individuals frequently apply directly online with a company and may fail to identify that he or she was referred, and that he or she is an individual with a disability. These commenters also expressed concern that referral data may include referrals of

individuals that are not qualified for the position(s) at issue. OFCCP believes that the points raised regarding the practical utility of the referral data have merit. Accordingly, OFCCP has eliminated from the final rule the requirement, in proposed paragraphs (k)(1) and (k)(2), for contractors to collect, maintain, and analyze information on the number of referrals it receives.

Many of these comments also asserted data integrity concerns regarding the requirement to document and maintain applicant and hiring ratios, including that applicant data appears to be dependent upon self-identification, which is not reliable. These issues were previously addressed in the discussion of the requirement to invite applicants to self-identify as individuals with disabilities in § 60-741.42(a). In short, demographic data based on self-identification is not perfect, but it is nonetheless valuable and the best data that is available.

Another concern asserted by commenters is that the proposed data collection and analysis is not “aligned” with the availability analysis conducted when examining employment activities for females and minorities. However, as discussed in the preamble to the goal requirement in § 60-741.45, below, it is not feasible to have the data collection for section 503 exactly mirror that of the Executive Order 11246 regulations.

Commenters also questioned the purpose of the job opening/job filled ratio. Upon reconsideration, OFCCP agrees that it is not necessary for contractors to calculate the job fill ratio and has deleted from the final rule the requirement, in proposed paragraph (k)(5), for contractors to calculate and maintain the ratio of jobs filled to job openings. OFCCP has also eliminated the requirement to calculate an applicant ratio in proposed paragraph (k)(7), and the requirement to calculate a hiring ratio in proposed paragraph

(k)(10). Thus, the final rule requires that contractors need only collect and maintain the raw data regarding the number of applicants with disabilities, the total number of job openings and jobs filled, the total number of applicants, the number of applicants with disabilities hired, and the total number of applicants hired.

Several commenters also objected to the collection of data about the disability status of applicants because it differs from the recordkeeping requirements related to Internet applicants under the Executive Order 11246 implementing regulations at 41 CFR 60-1.12. In recognition of these concerns, and as explained in the preamble discussion of § 60-741.42(a), in an effort to harmonize requirements across the various regulations OFCCP enforces, OFCCP will permit contractors to invite applicants to self-identify as an individual with a disability at the same time as the contractor collects the demographic data for applicants required under the Executive Order. OFCCP will also treat the recordkeeping provisions of section 503 at 41 CFR 60-741.80 in the same manner as the recordkeeping requirements under the Executive Order at 41 CFR 60-1.12 as applied to Internet applicants. With regard to burden calculation issues, many commenters, including employer associations, contractors, and individuals, indicated that OFCCP had not correctly calculated the burden of this section. Specific cost information was provided by several commenters. A revised burden calculation is included in the Regulatory Procedures section of this final rule. We highlight a few points here, however, because it appears that the contractor community may misunderstand portions of the obligation they are expected to undertake. First, as stated above, the referral data metrics have been eliminated, which reduces the burden. We have also eliminated the calculation of the job fill, applicant, and hiring ratios. Second, job-specific hiring data is



already collected and maintained by contractors pursuant to the Executive Order 11246 program. Moreover, hiring metrics are also maintained and calculated by Federal contractors subject to VEVRAA pursuant to their existing obligation, under 41 CFR part 61-300, to file the VETS-100A form. Therefore, that portion of paragraph (k) requiring contractors to document the total number of job openings and total number of hires does not create any additional burden. The only “new” items are those pertaining to the self-identification applicant data. However, the burden for collecting and maintaining the applicant data is already partially calculated under § 60-741.42(a).

Also pertaining to burden, commenters for the construction and transportation industries asserted that they should be exempted from this section of the proposed regulation because of the unique nature of the industries. Traditionally, construction and transportation contractors who meet the basic coverage thresholds (contract amount and number of employees) of section 503 have not been exempted from any of its provisions. Accordingly, we decline to exempt construction and transportation contractors.

The majority of commenters also cited burden concerns with the proposed requirement to maintain the paragraph (k) computations for a period of five (5) years. As set forth in the discussions of § 60-741.44(f)(4) and § 60-741.80 herein, the final rule reduces the document retention requirement to three (3) years, and revises the language of paragraph (k) to reflect this change.

A few of the comments also raised clarification questions we would like to address, including: (1) whether the intent of the analyses is to measure change from year to year; (2) whether the ratios should be run by job group, job title, or establishment; and (3) how compliance determinations will be made. As to the first question, measuring

change from year to year, and looking at two previous years of data, is a central intent of the analyses, as that can aid the contractor in seeing trends that may be associated with certain of its outreach and recruitment efforts over time. However, as previously discussed with regard to the self-assessment required in paragraph (f)(3) of this section, contractors are also free to use any other reasonable criteria in addition to the applicant and hiring data they feel is relevant to evaluate the effectiveness of its efforts. As to the second question, the ratios in paragraph (k) will be calculated by establishment, and not by job groups or titles within a given establishment, unless OFCCP has approved the contractor's development and use of a functional affirmative action program (FAAP) pursuant to 41 CFR 60-2.1(d)(4).

With regard to the third question, compliance determinations for paragraph (k) will be made based simply on whether the contractor has completely and accurately documented and maintained the eight listed metrics in the final rule. OFCCP Compliance Officers will not be using the applicant and hiring data to conduct underutilization or impact ratio analyses, as is the case under Executive Order 11246, and enforcement actions will not be brought solely on the basis of statistical disparities between individuals with, and without, disabilities in this data. Rather, Compliance Officers will look to see whether the contractor has fulfilled its various obligations under § 60-741.44, including its obligation, pursuant to § 60-741.44(f)(3), to critically analyze and assess the effectiveness of its recruitment efforts, using the data in paragraph (k) and any other reasonable criteria the contractor believes is relevant, and has pursued different or additional recruitment efforts if the contractor concludes that its efforts were not effective.

On the topic of OFCCP's invitation for public comments regarding the possible addition of a new annual reporting requirement, we received 20 comments. The majority of these comments asserted that the proposed requirement would impose an unnecessary additional burden. Several commenters stated that OFCCP did not provide any support or justification for proposing the requirement. A few of these commenters indicated that such a report would serve no other purpose than to assist OFCCP in the scheduling of compliance reviews. A few commenters supported the proposed reporting requirement, asserting that the data is needed to better ensure equal employment opportunities for individuals with disabilities. After weighing the practical utility of this potential reporting requirement against its anticipated burden OFCCP has determined that the imposition of this new reporting requirement is not warranted at this time. Accordingly, this proposal is not adopted into the final rule.

#### Section 60-741.45 Reasonable Accommodation Procedures

The NPRM proposed a new provision at § 60-741.45 requiring contractors to develop and implement written procedures for processing requests for reasonable accommodation. The proposal identified specific elements that the contractor's reasonable accommodation procedures, at a minimum, would be required to address. These included: 1) contact information for the official responsible for implementation of the procedures; 2) to whom a request for reasonable accommodation may be made; 3) a statement that requests for reasonable accommodation may be made orally or in writing by an applicant, employee, or third party on his or her behalf; 4) written confirmation of receipt of a reasonable accommodation request; 5) a timeframe for the processing of

reasonable accommodation requests; 6) a description of the contractor's reasonable accommodation process and circumstances under which the contractor may request medical documentation to support a reasonable accommodation request; and 7) provision of a written explanation by the contractor for any denials of reasonable accommodation.

OFCCP received 80 comments on this proposal from disability associations, employer associations, contractors, and law firms. The disability associations were strongly supportive of the proposed requirement. They asserted that it would foster contractor understanding of their reasonable accommodation obligation, encourage individuals who need reasonable accommodation to come forward and make a request, and promote efficiency in the processing of reasonable accommodation requests. Many of these commenters also recommended that the scope of the proposed requirement be expanded to encompass all Federal contractors subject to section 503 by relocating the requirement from the "affirmative action" subpart of the regulations (Subpart C) to the "nondiscrimination" subpart of the regulations (Subpart B).

In contrast, the majority of the contractor community objected to the new requirement for a variety of reasons. Many stated their belief that a mandated, "formal" process was unnecessary since most employers were already accustomed to making reasonable accommodations as required by the ADA. Some characterized the proposal as a "one size fits all" approach that would impede the ability of contractors to individually address reasonable accommodation requests, and to grant requests for accommodation informally (e.g., leave time for doctor visits or a modified work schedule to attend therapy sessions). Finally, commenters asserted that the requirement to develop written reasonable accommodation procedures, to provide written confirmation of reasonable

accommodation requests, and to provide written explanations of any denials of reasonable accommodation was unduly burdensome.

Upon further consideration of the burden associated with this provision, OFCCP has decided not to incorporate this proposal into the final rule. OFCCP, however, notes in new paragraph (d)(2) to § 60-741.44 of the final rule, that the use of written reasonable accommodation procedures is a best practice that may assist contractors in meeting their reasonable accommodation obligations. The paragraph makes clear that contractors are not required to have or use such procedures, and that not having such procedures is not violation of this part. OFCCP has also added a new Appendix B entitled Developing Reasonable Accommodation Procedures providing specific guidance that contractors may use should they choose to adopt this best practice.

Although OFCCP is not incorporating the written reasonable accommodation procedures requirement into the final rule, we wish to note our disagreement with those commenters who assert that written procedures would prevent contractors from individually addressing reasonable accommodation requests. Rather, we believe that having such procedures would serve to reinforce the obligation to individually address each person's request for reasonable accommodation. Moreover, in OFCCP's view, written reasonable accommodation procedures would not hamper a contractor's ability to informally grant accommodation requests, such as leave for visits to the doctor or a modified work schedule to attend therapy sessions. If a contractor has flexible leave or scheduling policies, having written reasonable accommodation procedures would not interfere with the granting of requests for leave or modified work schedules by

employees with disabilities simply because the request is made to accommodate a disability.

#### Section 60-741.46 Utilization Goals

Section 60-741.46 of the NPRM (renumbered as § 60-741.45 in the final rule) proposed a single, national 7 percent utilization goal for individuals with disabilities for each job group in a contractor's workforce. It proposed that covered contractors annually evaluate the representation of individuals with disabilities in each job group in the contractor's workforce against the 7 percent utilization goal. If the percentage of employees with disabilities in one or more job groups is less than the 7 percent utilization goal, the NPRM proposed that the contractor develop and execute action-oriented programs designed to correct any identified barriers to equal employment opportunity for qualified individuals with disabilities. Although it proposed a 7 percent goal, the NPRM invited the public to comment on a range of goal values between 4 percent and 10 percent. In addition, the NPRM alerted the public that OFCCP was considering an option of a sub-goal of 2 percent for individuals with certain particularly severe disabilities as part of the overall 7 percent goal, and invited public comment on this sub-goal option. Specifically, OFCCP requested comment on the concept of a sub-goal, as well as the disabilities to be included in the sub-goal.

OFCCP received 250 comments on this section from a broad range of perspectives, including contractors, law firms, government agencies, organizations representing individuals with disabilities and those representing contractors, as well as from individuals. The comments represented divergent views on the institution of a

single, national utilization goal. In general, the disability community and those representing their interests were strongly in support of this new requirement. For these commenters, affirmative action efforts under section 503 have been largely meaningless without, among other things, measurable goals for the employment of people with disabilities. By and large, these commenters urged OFCCP to increase the utilization goal from 7 percent to 10 percent and to adopt a sub-goal of 5 percent for individuals with severe disabilities. In contrast, commenters from the contractor community and those representing their interests were largely opposed to this provision and to the sub-goal option for various reasons, including: (1) OFCCP lacks authority to mandate the 7 percent goal; (2) the utilization goal is equivalent to a quota; (3) use of ACS data is arbitrary and ineffective; and (4) the goal approach is unworkable as proposed. The proposed utilization goal, comments to the proposal, and the subsequent revisions made in the final rule are discussed in turn below. Comments related to the burden estimates associated with this section are addressed in the Regulatory Procedures section of the final rule.

- Paragraph (a): Establishment of a single, national utilization goal

Paragraph (a) of the NPRM proposed to establish for the first time a single, national utilization goal of 7 percent for employment of individuals with disabilities for each job group within a contractor's workforce.<sup>19</sup> As explained in the NPRM, the current section 503 regulatory framework requires affirmative action but lacks a goal. This has

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<sup>19</sup> OFCCP received several comments seeking clarification of the difference between a utilization goal and a placement goal. A placement or hiring goal relates to the percentage of new hires from a particular group, such as individuals with disabilities. In contrast, a utilization goal relates to the percentage of a contractor's workforce represented by a particular group, in this instance, individuals with disabilities.

been the case since the initial publication of the section 503 regulations in the 1970s, but the intervening years have seen little improvement in the unemployment and workforce participation rates of individuals with disabilities. OFCCP determined that affirmative action process requirements, without a quantifiable means of assessing whether progress toward equal employment opportunity is occurring, are insufficient. We therefore concluded that the establishment of a utilization goal would create more accountability within the contractor's organization and provide a much-needed tool to help ensure that progress toward equal employment opportunity is achieved.

- Methodology for Setting the Utilization Goal

As explained in the NPRM, the utilization goal established in this section is derived primarily from the disability data collected as part of the American Community Survey. The American Community Survey (ACS) was designed to replace the census "long form" of the decennial census, last sent out to U.S. households in 2000, to gather information regarding the demographic, socioeconomic and housing characteristics of the nation. Whereas the Census Bureau now only administers a very short survey for the decennial census, a more detailed view of the social and demographic characteristics of the population is provided by the ACS, which collects data from a sample of 3 million residents on a continuing basis.<sup>20</sup>

The ACS was first launched in 2005, after a decade of testing and development by the Census Bureau. Refinement of the questions designed to characterize disability status has been continuous, with the current set of disability-related questions incorporated into

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<sup>20</sup> A national sample of approximately 3 million addresses nationwide receives the ACS each year, with a portion of this total receiving the survey each month. For more information on the American Community Service visit the Census Bureau's ACS web page at [www.census.gov/acs](http://www.census.gov/acs).



the ACS in 2008. Taken together, the six dichotomous (“yes” or “no”) disability-related questions<sup>21</sup> comprise a function-based definition of “disability,” used in the ACS and by most of the other major surveys administered by the Federal Statistical System.

The definition of disability used by the ACS, however, is clearly not as broad as that of the Rehabilitation Act and the ADA. For example, since the ACS questions do not say that one should respond without considering mitigating measures (e.g., medication or aids), some individuals with disabilities that are well-controlled by medication (e.g., depression or epilepsy) or in remission might respond to the ACS that he or she does not have a disability. Likewise, since the ACS questions do not include major bodily functions, an individual who has a disability that substantially limits a major bodily function, but does not limit a major life activity as originally defined in the ADA, might respond that he or she does not have a disability on the ACS. Despite its limitations, the ACS is the best source of nationwide disability data available today, and, thus, an appropriate starting place for developing a utilization goal.

In developing the utilization goal, OFCCP considered two general approaches. The first approach OFCCP considered aimed to mirror precisely the goals framework for minorities and women that is used by supply and service (non-construction) contractors subject to Executive Order (EO) 11246. Such an approach would have required individual contractor establishments to set their own goals for each of their job groups<sup>22</sup>

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<sup>21</sup> The six questions are: Is this person deaf or does he/she have serious difficulty hearing? Is this person blind or does he/she have serious difficulty seeing even when wearing glasses? Because of a physical, mental, or emotional condition, does this person have serious difficulty concentrating, remembering, or making decisions? Does this person have serious difficulty walking or climbing stairs? Does this person have difficulty dressing or bathing? Because of a physical, mental, or emotional condition, does this person have difficulty doing errands alone such as visiting a doctor’s office or shopping? 2009 American Community Survey, Questions 17-19.

<sup>22</sup> Job groups usually contain one to three jobs each. However, contractors with fewer than 150 employees

based on the percentage of individuals with disabilities available in the particular recruitment area from which the contractor sought to fill the jobs in the job group. Where there are fewer than expected incumbent employees with disabilities in a job group given their availability percentage, a contractor would be required to establish a goal for the specific job group that is at least equal to the availability percentage in the job group's recruitment area. See 41 CFR 60-2.12 – 60-2.16 for a more detailed description of the EO 11246 goals provisions for supply and service contractors.

After careful consideration of the available data and consultation with the U.S. Census Bureau regarding the level of geographic aggregation at which the disability data could be analyzed, OFCCP became convinced that replicating the supply and service goals framework would not be the most effective approach for the establishment of goals for individuals with disabilities. Supply and service contractors establishing goals for minorities and women typically use the Special EEO Tabulation of census data to assist them. The results of the 2000 decennial census can be tabulated for 472 occupation categories and thousands of geographic areas. However, because the ACS disability data is based on sampling, and because the percentage of that sample who identify as having a disability is considerably smaller than the percentage that provide race and gender information, it cannot be broken down into as many job titles, or as many geographic areas as the data for race and gender. That is, the confidence intervals on such estimates are large and the estimates are not statistically significant when broken down to the degree of detail required by the supply and service goals framework. Contractors therefore would not be able to use the job groups established under Executive Order

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may use the broader EEO-1 job categories in place of smaller job groups.

11246 to establish goals for individuals with disabilities, and would often be unable to utilize the geographic recruitment areas established under the Executive Order when determining the availability of individuals with disabilities (as queried in the ACS).<sup>23</sup> In addition, the Executive Order supply and service goals framework does not include consideration of discouraged workers in computing availability, a factor particularly important in the context of disability, as discussed below.

In light of the difficulties replicating the supply and service goals approach in the context of disability, OFCCP considered other options. OFCCP concluded that the establishment of a single, national goal<sup>24</sup> for all jobs in all geographic areas is a more viable approach to the establishment of a goal for individuals with disabilities. This

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<sup>23</sup> On November 29, 2012, the Census Bureau released the new 2006-2010 EEO Tabulation (EEO Tab) to the public. The new EEO Tab replaces the 2000 Special EEO Tabulation. It is based on five years of demographic data from the ACS, rather than on a decennial census, tabulates data for 488 occupations including several occupations not previously included in the 2000 Special EEO Tabulation, and includes data by citizenship status. The EEO Tab is online at <http://www.census.gov/people/eeotabulation/>.

On March 14, 2013, the Census Bureau launched the first of its kind 2008-2010 Disability Employment Tabulation (Disability Tab) containing statistical information regarding the employment status, earnings, race, ethnicity and occupations of individuals with disabilities. The Disability Tab, online at <http://www.census.gov/people/disabilityemptab/data>, was sponsored by the U.S. Department of Labor and, in contrast to the EEO Tab, is intended to be a research resource rather than an enforcement tool. Although the Disability Tab includes data for each occupation in the EEO Tab, important differences between the tabs make the Disability Tab impractical for contractors to use to set individual placement goals for each of their Executive Order job groups. These differences include: 1) the Disability Tab uses three years of ACS data rather than the five years used in the EEO Tab; 2) the geographical designations of “county sets” and “places” (cities) are used in the EEO Tab but not in the Disability Tab; 3) the geographical designation of public use microareas (PUMAs) are used in the Disability Tab but not in the EEO Tab; and 4) the citizen-only tables in the Disability Tab contain occupation-specific data solely at the national level. In light of these differences, were we to require the establishment of individual disability placement goals using the Disability Tab many contractors would be forced to identify and utilize recruitment areas for this purpose different from those they currently use when establishing individual Executive Order goals. The creation of such a “parallel” process for the establishment of disability goals would be far more burdensome for contractors than the single, national utilization goal process established in this final rule.

<sup>24</sup> Disability rates by State for the civilian labor force has a mean of 6.32, median of 6.20, and standard deviation of 1.29. There are only two states, Alaska (9.0%) and Oklahoma (9.5%) that are outside the 95% confidence interval of this otherwise almost uniform distribution. This general uniformity is consistent with the use of a single national goal. See Table 15 in Affirmative Action for People with Disabilities – Volume I: Data Sources and Models, Economic Systems, Inc. (April 30, 2010) at 55.

approach allows for the continued use of the contractor's Executive Order 11246 job groups, and requires that those job groups be used to measure the representation of individuals with disabilities in the contractor's workforce, except in cases of contractors with fewer than 100 employees, where contractors will have the option to apply the goal to their workforce as a whole. The goal established in this section is based on the 2009 ACS disability data for the "civilian labor force" and the "civilian population,"<sup>25</sup> first averaged by EEO-1 job category, and then averaged across EEO-1 category totals. Specifically, we used the mean across these EEO-1 groups to estimate that 5.7 percent of the civilian labor force has a disability as defined by the ACS.<sup>26</sup> However, OFCCP acknowledges that this number does not encompass all individuals with disabilities as defined under the broader definition in section 503 and the ADAAA. Therefore, 5.7 percent is an insufficient figure to use as an affirmative action goal for individuals with disabilities under section 503.

Even if the 5.7 percent represented a complete availability figure for all individuals with disabilities as defined under section 503, such an availability figure does not take into account discouraged workers, or the effects of historical discrimination against individuals with disabilities that has suppressed the representation of such individuals in the workforce. Discouraged workers are those individuals who are not now seeking employment, but who might do so in the absence of discrimination or other

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<sup>25</sup> The civilian labor force is the sum of people who are employed and those who are unemployed and looking for work. The civilian population is the civilian labor force plus civilians who are not in the labor force, excluding those in institutions.

<sup>26</sup> Similarly, the Disability Tab found that between 2008 and 2010 individuals with disabilities were 6% of the civilian labor force. See Census Bureau press release, Workers with a Disability Less Likely to be Employed, More Likely to Hold Jobs with Lower Earnings, Census Bureau Reports, (March 14, 2013) available online at [http://www.census.gov/newsroom/releases/archives/american\\_community\\_survey\\_acs/cb13-47.html](http://www.census.gov/newsroom/releases/archives/american_community_survey_acs/cb13-47.html).

employment barriers. There are undoubtedly some individuals with disabilities who, for a variety of reasons, would not seek employment even in the absence of employment barriers. However, given the acute disparity in the workforce participation rates of those with and without disabilities, it is reasonable to assume that at least a portion of that gap is due to a lack of equal employment opportunity.

To estimate the size of the discouraged worker effect, we compared the percent of the civilian population with a disability (per the ACS definition) who identified as having an occupation to the percent of the civilian labor force with a disability who identified as having an occupation. Though not currently seeking employment, it is reasonable to believe that those in the civilian population who identify as having an occupation, but who are currently not in the labor force, remain interested in working should job opportunities become available. Using the 2009 ACS EEO-1 category data, the result of this comparison is 1.7 percent.<sup>27</sup>

Adding this figure to the 5.7 percent availability figure above, resulted in 7.4 percent.<sup>28</sup> The national utilization goal prescribed in this section is derived from this total, rounded to 7 percent to avoid implying a false level of precision.

- Comments on paragraph (a)

Many of the comments received on the proposed utilization goal addressed OFCCP's methodology for arriving at the 7 percent availability estimate, including the use of a discouraged worker estimate within the 7 percent figure. In general, commenters

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<sup>27</sup> This number was derived from an updated 2009 version of Table 24 in Affirmative Action for People with Disabilities – Volume I: Data Sources and Models, Economic Systems, Inc. (April 30, 2010) at 64. The original table uses ACS data from 2008.

<sup>28</sup> As it is derived from ACS data, the 1.7% is also a limited number that does not fully encompass all individuals with disabilities as defined in section 503 and the ADA.

in favor of the proposed single, national utilization goal accepted the methodology used by OFCCP to derive the goal but urged OFCCP to increase the goal from 7 percent to 10 percent given that the ACS data upon which the goal is based is only partially representative of those covered by section 503. As confirmation that the 7 percent figure is too low, these commenters referred to the Final Regulatory Impact Analysis for the EEOC regulations implementing the ADA Amendments Act which estimated that somewhere between 20 percent and 64 percent of individuals covered by the ADA as amended participate in the labor force. Given this estimate, the commenters stated that OFCCP ought to aim higher than 7 percent. Within OFCCP's suggested range of between 4 percent and 10 percent, these commenters urged the goal be set at 10 percent.

With regard to OFCCP's use of the discouraged worker effect, commenters in favor of the proposal noted that discouraged workers are those who have not looked for work not because they lack the desire to work, but rather because they believe that no work is available for them. The goal requirement should reflect the assumption that new outreach and recruiting efforts will have some effect in correcting the notion among discouraged workers that no jobs are available for individuals with disabilities. A number of these commenters also noted that the 1.7 percent estimate used by OFCCP is likely under-inclusive since the value was derived from the ACS data.

OFCCP declines to adopt a 10 percent goal at this time. We recognize that 7 percent is an imprecise estimate based on a data set that is more narrow than the universe of individuals with disabilities protected under section 503. However, as explained above, this figure is derived from the best available source of workforce disability data that presently exists. In contrast, the 10 percent figure urged by many of the commenters

is based solely on the general notion that 7 percent is too low, in light of the differing definitions of “disability” in the ACS and the ADA, and the EEOC’s general estimate that somewhere between 20 percent and 64 percent of individuals covered by the ADA participate in the labor force. The commenters, however, did not suggest an alternative data base from which OFCCP could derive an appropriate utilization goal. Nor does the EEOC estimate, which juxtaposes the workforce participation rate of individuals with disabilities with the overall workforce participation rate for all adults (with and without a disability) age 16 and older, provide sufficiently specific information on which OFCCP could rationally base a utilization goal for individuals with disabilities. Indeed, EEOC did not use this estimate for such a purpose. See 76 FR 16978, 16991 (March 25, 2011). Having said that, as indicated in the final rule at § 60-741.45(c), OFCCP will periodically review and update the utilization goal as data becomes more refined.

A substantial number of commenters from the contractor community objected to the proposed 7 percent utilization goal on the grounds that it is arbitrary. They argued that the 7 percent figure is based on ACS data that is based on a definition of “disability” that is narrower than the term used under section 503. Without consistent definitions, they argue, the results are meaningless for establishing a goal for utilization of individuals with disabilities. Furthermore, the figure fails to take into account variations in occupational requirements, geography, industry, and nature of disabilities. Many commenters asserted that there is no statistical evidence to support the idea that the population of those with disabilities is distributed equally across all geographic areas. Additionally, one commenter noted that across the board goals are unrealistic because certain job groups will have inherent limitations. The commenter noted that there are

some jobs for which some individuals with certain disabilities will never qualify. For instance, a person who is blind, deaf, or paralyzed would not be granted a commercial pilot's license by the Federal Aviation Administration. Given these variations, even the best intentioned contractor may have significant challenges meeting the utilization goal across all job groups.

Still other commenters were opposed to applying a national goal to each job group because the goal as proposed represents an aggregate availability for individuals with disabilities across EEO category totals. Applying a number that represents the average availability across all categories to individual job groups would, thus, be inappropriate. Many of these commenters argued that OFCCP should delay imposing a utilization goal requirement until such time that data is available to enable goal setting in a manner similar to what is done under the EO 11246 supply and service affirmative action program.

Finally, several commenters expressed concern about OFCCP's discouraged worker estimate. These commenters questioned the accuracy of the estimate and posited that many of those discouraged are not actually interested in employment at all. They state that the most obvious explanation for an individual's departure from the workforce is the disability itself. One commenter also objected to OFCCP inclusion in the goal of a 1.7 percent figure to account for individuals with disabilities who have become discouraged workers and for the effects of historical discrimination. This commenter stated that the Bureau of Labor Statistics reports discouraged workers with disabilities account for only 0.1 percent of the workforce.

OFCCP recognizes that the 7 percent figure is less precise than the geographically



specific availability information that contractors are familiar with under the Executive Order 11246 program, and that for some jobs in some locations availability of qualified individuals may be less than 7 percent. Furthermore, we recognize that the ACS data is based on a definition of disability that is narrower than that used under section 503. We disagree, however, that this is sufficient reason to eliminate the utilization goal. While not perfect, the goal will provide a yardstick against which contractors will be able to measure the effectiveness of their equal employment opportunity efforts. It is our belief that the goal will enable contractors to think critically about their employment practices, including their outreach, recruitment, and retention efforts, and help them to assess whether and where any barriers to equal employment opportunity for individuals with disabilities remain. If barriers are identified, then the contractor can move to take corrective action. Because the goal is intended solely as a tool, the final rule clearly states that a failure to meet the goal will not, in and of itself, result in a violation of section 503 or a finding of discrimination. The goal is not a rigid and inflexible quota which must be met, nor is it to be considered either a ceiling or a floor for the employment of particular groups. OFCCP will look at the totality of the contractor's affirmative action efforts to determine whether it is in compliance with its affirmative action obligations under this section. As discussed below, if the contractor has complied with the requirements of this part and no impediments to equal employment opportunity exist, then the fact that the contractor does not meet the goal will not result in a violation.

With regard to commenter concerns regarding the use of the discouraged worker effect, more than twenty years after the passage of the ADA and nearly forty years after the passage of the Rehabilitation Act, there continues to be a substantial discrepancy

between the workforce participation and unemployment rates of working age<sup>29</sup> individuals with and without disabilities. According to the U.S. Department of Labor's Bureau of Labor Statistics (BLS), just 20.9 percent of working age individuals with certain functional disabilities were in the labor force in 2011, compared with 69.7 percent of working age individuals without such disabilities. This same data also indicates that the unemployment rate for those with these disabilities was 15.0 percent, compared with an 8.7 percent unemployment rate for those without a disability. This acute disparity in the workforce participation and unemployment rates of working age individuals with disabilities persists, despite the many technological advances that now make it possible for a broad array of jobs to be successfully performed by individuals with severe disabilities. OFCCP therefore believes that at least a portion of this gap is due to discrimination and sought to take this gap into account in the establishment of the goal by including in its calculation a discouraged worker figure. OFCCP acknowledges that the 1.7 percent figure we included in the goal is different from the 0.1 percent BLS figure cited by a commenter. However, the BLS figure represents the number of discouraged workers with disabilities among the universe of discouraged workers, whereas the 1.7% figure we used approximates the number of discouraged disabled workers among the universe of individuals with disabilities.

In addition to the concerns about the methodology used to derive the goal, several commenters asserted that OFCCP lacked authority to mandate a 7 percent utilization goal. These commenters noted that section 503 requires affirmative action for qualified individuals with disabilities; they assert that there is no duty to take affirmative action

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<sup>29</sup> The working age population consists of people between the ages of 16 and 64, excluding those in the military and people who are in institutions.

with regard to a general category of “individuals with disabilities.” Because section 503 requires affirmative action only for qualified individuals with disabilities, these commenters argue that a 7 percent utilization goal is impermissible unless the availability data revealed that underutilization of qualified individuals with disabilities exists for each job group in every geographic area.

It appears from these comments that the NPRM did not make explicit enough that the utilization goal requirement is for the utilization of qualified individuals with disabilities. OFCCP did not intend, nor do we believe that the proposed rule would have required, that a contractor employ and advance in employment individuals with disabilities who are not qualified for the position in question. Nevertheless, to address this confusion, we have revised paragraph (a) of the utilization goal requirement in the final rule by inserting the word “qualified” before the term “individuals with disabilities” to clarify that the 7 percent utilization goal is for the employment of qualified individuals with disabilities.

OFCCP also received a number of comments objecting to the proposed utilization goal set forth in paragraph (a) on the grounds that job group specific utilization goals are fundamentally unworkable as proposed. Commenters argued that anonymous self-identification will impede a contractor’s ability to analyze utilization of individuals with disabilities and furthermore that such goals will ultimately belie any assurance of confidentiality as the identities of disabled persons would become evident as soon as the AAP data were produced to show the representation of individuals with disabilities in each job group. Moreover, commenters expressed concern that a utilization goal will be difficult to attain because many applicants and employees will be unwilling to disclose

their disability, particularly hidden disabilities. Still others expressed concern that pre-offer self-identification will render companies vulnerable to lawsuits for wrongfully failing to hire an individual with a disability.

OFCCP disagrees that job group specific utilization goals are unworkable. First, with regard to the concerns that anonymous self-identification will hinder the contractor's ability to perform a utilization analysis by job group, OFCCP concurs that identifying information is in fact needed in order for contractors to assess their utilization of individuals by job group. We have, therefore, revised § 60-741.42, the provision related to self-identification, by removing the anonymity requirement. Second, as explained above in the preamble for § 60-741.42, Invitation to Self-Identify, OFCCP concedes the possibility that self-reported data regarding disability will not be entirely accurate. While not perfect, the data that will result from the invitation to self-identify will provide the contractor and OFCCP with important data that do not now exist pertaining to the participation of individuals with disabilities in the contractor's applicant pools and labor force. This will allow the contractor and OFCCP to better identify and monitor the contractor's hiring and selection practices with respect to individuals with disabilities. Finally, regarding the concern that pre-offer self-identification will render contractors vulnerable to lawsuits for wrongfully failing to hire an individual with a disability, OFCCP is not persuaded. While knowledge of the existence of a disability is a component of an intentional discrimination claim, the contractor must not only have known of the person's disability, but must also have treated the person less favorably because of his/her disability. We note that contractors have long had knowledge of a person's race and gender. Having knowledge of a person's disability should be no

different. In addition, we note that contractors have long had knowledge of the disabilities of applicants who have visible disabilities, such as blindness, deafness, or paraplegia, but that OFCCP has had no means of knowing of their presence in the applicant pool or their experience in the application process. Requiring contractors to invite pre-offer self-identification will help fill this void.

Finally, several commenters requested that OFCCP create an exemption from the goal requirement for industries with physically demanding jobs, namely the construction industry, and for safety-sensitive positions, including flight crewmembers, flight attendants, flight instructors, aircraft dispatchers, aircraft maintenance and preventive maintenance workers, ground security coordinators, aviation security screeners, and air traffic controllers. Another commenter requested that AbilityOne contractors be exempt from the goal requirement because they are already operating under high standards. This commenter stated that the AbilityOne program requires that at least 75 percent of the direct labor in a participating nonprofit agency be performed by people who are blind or have other significant disabilities.

OFCCP declines to adopt exemptions from the goal requirement in the final rule. Requests to exempt contractors from meeting the utilization goal for safety sensitive positions or for physically demanding jobs are fundamentally based on the flawed notion that individuals with disabilities as a group are incapable of working in these jobs. OFCCP does not support this belief and will not construct an avenue to permit contractors to avoid hiring individuals with disabilities for certain jobs. OFCCP acknowledges that some individuals with certain disabilities may not be able to perform some jobs, but does not believe exemptions are necessary for two reasons. First, neither

section 503 nor this part require a contractor to hire an individual who cannot perform the essential functions of the job, or who poses a direct threat to the health or safety of the individual or others. Second, the goal is not a quota and failure to meet the goal will not, in and of itself, result in any violation or enforcement action. With regard to the request to exempt AbilityOne contractors from the goal requirement, we likewise do not believe that a regulatory exemption is warranted. The final rule applies, not just to “direct labor,” but to the entirety of a covered contractor’s workforce, and to the entirety of covered subcontractors’ workforces, as well. In short, the goal requirement is a management tool from which all contractors can benefit.

- Comments on sub-goal option

As noted above, in the NPRM OFCCP indicated that it was considering the option of including within the 7 percent goal for individuals with disabilities a sub-goal of 2 percent for individuals with certain particularly severe disabilities and invited public comment on the sub-goal concept, as well as on which disabilities should be included within the sub-goal. OFCCP specifically sought comments addressing 1) the data or research available that informs the design of an appropriate sub-goal, including which severe disabilities should be covered by the sub-goal and the appropriate sub goal target; 2) how a sub-goal furthers the overall objective of increasing employment opportunities for individuals with severe disabilities; and 3) the data or research available on the need for a sub-goal for specific disabilities.

OFCCP received 126 comments on this sub-goal option. Many commenters from the disability community favored such an approach but urged OFCCP to increase the sub-goal from 2 percent to 5 percent. These commenters stated that any serious effort to

measure the effectiveness of one's affirmative action efforts must look not only at the overall group of individuals with disabilities but also at those within that group who have had the greatest barriers to employment and are most in need of affirmative action. Having only an overall goal for the extremely broad group of people with disabilities would permit contractors to employ individuals with less stigmatized disabilities, and would do little to ensure that those individuals with the greatest history of exclusion from the workforce would benefit from affirmative action. These commenters urged OFCCP to increase the sub-goal to 5 percent, because they believe that the group of individuals who would likely be captured by a sub-goal would be greater than 2 percent of the labor force.

In response to OFCCP's request as to which disabilities to include in the sub-goal, a substantial number of commenters from the disability community emphasized the need to fashion a sub-goal that captures individuals "with the lowest employment rates and greatest barriers to employment." These commenters urged OFCCP to not rely on the "targeted disabilities" list the Federal government uses to monitor its internal hiring as the source of its sub-goal, but should instead develop its own, more expansive list of "targeted disabilities." Commenters proffered several approaches, discussed below, that OFCCP could use to create a section 503 sub-goal.

One approach would entail OFCCP working with experts from various universities to identify those categories of disabilities that have caused people to face the greatest employment barriers. OFCCP would then create a "targeted disabilities" list comprised of the identified disabilities. While several if not all of the conditions currently on the Federal government's list would be on this list, commenters anticipated

that this new “targeted disabilities” list would also include conditions not on the current list, such as autism spectrum disorders and Down syndrome, among others.

A second approach recommended by these commenters was to base a sub-goal on the statutory definition of “significant disability,” at 29 U.S.C. 705(21)(A), that is used for determining selection for vocational rehabilitation services. This definition not only specifies a list of covered conditions, but also requires an assessment of whether each individual’s condition is “a severe physical or mental impairment which seriously limits one or more functional capacities (such as mobility, communication, self-care, self-direction, interpersonal skills, work tolerance, work skills) in terms of an employment outcome.” There are 26 conditions on the covered conditions list, some of which are very specific, such as amputation, paraplegia, quadriplegia, blindness, and deafness. Other listed conditions, though, encompass broad categories of impairments that can vary widely in their nature and severity, such as arthritis, head injury, burn injury, heart disease, musculo-skeletal disorders, and neurological disorders.

A third approach commenters identified was for OFCCP to analyze a variety of data sources, including ACS, the Survey on Income and Program Participation (SIPP), the Current Population Survey (CPS), CDC data, and other data, to identify which individuals with disabilities experience the greatest employment barriers. OFCCP would then design a sub-goal focused on the disabilities associated with these individuals.

Many of the commenters opposed to the utilization goal requirement also opposed a sub-goal option. The reasons for their opposition were similar to those already expressed in opposition to the 7 percent utilization goal. Many asserted that the 2 percent figure was arbitrary and that it would be incongruous to hold contractors to a standard



that the Federal government itself has proven unable to meet. The comments received also stated that there would be many industries for which those with severe disabilities would be unable to work. One commenter highlighted that the sub-goal for individuals with severe disabilities is inconsistent with the Federal Aviation Administration's regulatory scheme regarding medical certification of persons employed in certain safety sensitive positions, and that if a safety exception is not recognized, then OFCCP should establish a lesser goal, because the availability of applicants with severe disabilities qualified for safety sensitive positions would necessarily be fewer. One advocacy organization for individuals with disabilities stated that a sub-goal was not necessary, because it would require a more detailed inquiry regarding the specific nature of an individual's disability by contractors, which would cause discomfort among people with disabilities. A sub-goal also disregards the fact that often the severity of the disability, not just the type of disability, significantly impacts an individual's employment opportunities.

OFCCP declines to adopt a sub-goal option at this time. Although the comments presented a variety of general approaches to designing a sub-goal, none provided a clear methodology or data source for the identification of a sub-goal target. Nor did they provide for the identification of a clear, practicable list of specific conditions that a sub-goal should encompass. We also note that the approach regarding the use of the vocational rehabilitation definition of "significant disability" as the basis of a sub-goal would require the application of a definition of "disability" that is different from that in section 503. Moreover, it would, in many instances require contractors to ask for detailed disability-related information, beyond the mere existence of a specific condition, so that

the contractor could determine whether an individual has a “severe” physical or mental impairment that is encompassed by the sub-goal. This does not mean that contractors may not, on their own, establish appropriate mechanisms and goals to affirmatively seek to encourage the employment of individuals with significant or severe disabilities.

However, these regulations do not include such requirements.

- Paragraph (b): Purpose

Proposed § 60-741.46(b) stated that the purpose of the utilization goal is to establish a benchmark against which the contractor must measure the representation of individuals within each job group in its workforce. Proposed § 60-741.46(b) also stated that the utilization goal serves as an equal employment opportunity objective that should be attainable by complying with all aspects of the affirmative action requirements of this part.

Many commenters opposed to the proposed utilization goal stated that the goal was equivalent to an inflexible “quota” because a contractor who fails to achieve the 7 percent utilization goal would be required to take specific measures to address the disparity. According to these commenters, there is nothing aspirational about this requirement and, unlike the Executive Order 11246 regulations implementing the affirmative action requirements for supply and service contractors, the NPRM implementing section 503 failed to state specifically that the utilization goal is not a rigid, inflexible quota nor does it state that quotas are expressly forbidden. Other commenters stated that any required objective or goal that imposes a penalty if not met is a quota. Still another intimated that the utilization goal as proposed would fail to survive a constitutional challenge because such a requirement would be subject to the highest level

of judicial scrutiny.

The proposed utilization goal is not an inflexible quota and should not be perceived as one. The goal is intended to serve as a management tool to help contractors measure their progress toward achieving equal employment opportunity for individuals with disabilities and to assess whether barriers to equal employment opportunity remain. OFCCP recognizes that a failure to meet the 7 percent utilization goal does not necessarily mean that the contractor is discriminating against individuals with disabilities. It is for this reason that the NPRM stated in proposed § 60-741.46(f) that a contractor's determination that it has not attained the utilization goal in one or more job groups does not constitute either a finding or admission of discrimination in violation of this part. Nevertheless, in light of the comments, OFCCP has revised the regulatory language to clarify that a failure to meet the utilization goal triggers an assessment of whether there is a barrier to equal employment opportunity, and if so, what the barrier is. Specifically, new paragraph (e) in the final rule states that when the goal has not been met in one or more job groups the contractor must "determine whether and where impediments to equal employment opportunity exist." This determination is to be based on reviews of the contractor's personnel processes and affirmative action efforts that the contractor is already required to perform. Only if a problem or barrier to equal employment opportunity is identified, must the contractor then develop and execute an action-oriented program to address the problem.

With regard to the comment that the proposed utilization goal would fail to survive a constitutional challenge because such a requirement would be subject to the highest level of judicial scrutiny, we again note that the utilization goal established herein

is not a quota and does not require disability-based decision making. Rather, the goal is a tool to measure the effectiveness of the Federal contractor's employment practices as they relate to equal employment opportunity for qualified individuals with disabilities. A failure to meet the goal does not result in any violation; it triggers a critical review by the Federal contractor of its employment practices. Furthermore, even if a court were to determine that the framework set forth herein required disability-based decision making, strict scrutiny review is not applied to decisions based on disability. Instead, classifications based on disability are subject to "rational basis review," and are legally permissible so long as the governmental action – in this case, the setting of a 7 percent utilization goal – is rationally related to a legitimate governmental interest. See, e.g., Contractors Ass'n of E. Pa., Inc. v. City of Phila., 6 F.3d 990 (3<sup>rd</sup> Cir. 1993) (applying rational basis review of a city ordinance that established goals for the participation of disability-owned businesses in city contracts); City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 442-45 (1985). OFCCP believes that establishing a utilization goal of 7 percent for individuals with disabilities is clearly related to the legitimate governmental interest of increasing outreach to and employment opportunities for individuals with disabilities -- a segment of the population that suffers from staggering levels of unemployment and a significant history of discrimination.

- Paragraph (c): Periodic review of the goal

Proposed paragraph (c) stated that the Director of OFCCP will periodically review and update the 7 percent utilization goal requirement as appropriate. One commenter expressed concern that in light of the Federal government's current fiscal situation, future budget constraints would likely impede OFCCP from ever revising the proposed goal.

OFCCP, like many other Federal agencies, has experienced fluctuations in its funding throughout its more than 40 years of continuous operation. We have no reason to anticipate, however, that such fluctuations would impede our ability to periodically review and update the goal, as appropriate, as provided in the final rule.

- Paragraph (d): Utilization analysis

Proposed paragraph (d) set forth the purpose of a utilization analysis and required that covered contractors annually evaluate the representation of individuals with disabilities in each job group in the contractor's workforce that the contractor uses for utilization analyses under Executive Order 11246 and compare the rate of representation for each group against the 7 percent utilization goal. For purposes of clarity and in response to numerous commenters' concern that the goal is really a quota, OFCCP has revised proposed paragraph (d)(1), which set forth the purpose of a utilization analysis, by deleting the sentence that states: "If individuals with disabilities are employed in a job group at a rate less than the utilization goal, the contractor must take specific measures to address this disparity." Paragraph (d)(1) is intended to state the purpose of the utilization analysis. This deleted sentence was unrelated to the purpose. Moreover, as explained earlier in the preamble, failure to meet the goal does not automatically trigger the execution of action-oriented programs. For this reason, we found the sentence misleading.

OFCCP received a number of alternatives to the proposed utilization goal, somewhat related to the utilization analysis. Several commenters requested that if the agency were to move forward with the goal requirement, the goal should apply to the entire corporation across all establishments rather than to each job group. One

commenter suggested that two goals be implemented – one for supply and service contractors and another for construction contractors. Another recommended that the goal apply by AAP location or organizational unit. Still another suggested that OFCCP remove a set figure and allow each contractor to establish a reasonable utilization goal for its establishments taking into account specific factors involved at each particular workplace. Finally, at least one commenter requested that a range of 4 percent to 10 percent be adopted to allow contractors the flexibility to account for variations in geography, occupational requirements, and nature of disabilities.

OFCCP declines to adopt these proposed alternatives. As explained in the NPRM, we did consider permitting contractors to compare the individuals with disabilities in its workforce as a whole to the proposed 7 percent goal. We decided against adopting this approach on a broad scale because of its potential for masking discrimination and segregation. For example, a contractor that has segregated all of its employees with disabilities into one or two low-paying jobs might be able to conceal this discrimination and satisfy this 7 percent goal if only a single whole-workforce comparison were required by this section.

However, we are mindful that certain small contractors may find it more difficult than other contractors to attain the goal if compelled to apply it to each of their job groups, simply because of their small size. In recognition of this fact, the final rule is revised, with the addition of paragraph (d)(2)(i), to create an exception that permits contractors with a total workforce of 100 or fewer employees to apply the 7 percent goal to their entire workforce as a whole, rather than to each job group. This will ensure that the burden on these small companies is minimized, while still providing them with a

yardstick by which to measure the effectiveness of their efforts to recruit and hire individuals with disabilities. These contractors are reminded, though, that while they are permitted to measure their utilization of individuals with disabilities in their workforce as a whole, they may not attain the goal by engaging in the unlawful segregation of employees with disabilities.<sup>30</sup>

OFCCP declines to adopt the other approaches proposed by contractors because they would all result in greater burden on contractors than the approach we have chosen. None of the alternative proposals would allow contractors to use their existing EO 11246 job groups, and all would require contractors to identify organizational units for the purpose of establishing or effectuating a goal, and to explain the factors they applied in making their determinations. A number of commenters expressed concern that contractors may be able to use their relationship with sheltered workshops to circumvent the goal requirement. Some of these commenters fear that contractors will be able to count toward their goal the employees of a sheltered workshop subcontractor. Some fear that contractors will be able to meet their goal by establishing their own sheltered workshop, or by counting toward the goal those individuals being trained for future employment at a sheltered workshop. Still others asked that OFCCP ban sheltered workshops and prohibit contractors from using them at all.

Sheltered workshops are segregated facilities that exclusively or primarily employ persons with disabilities. Many sheltered workshops are authorized to pay special minimum wages under an exemption in section 14(c) of the Fair Labor Standards Act

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<sup>30</sup> The exception created in paragraph (d)(2)(i) of this section is in addition to the existing exception under Executive Order 11246 that permits contractors with a total workforce of fewer than 150 employees to use the nine broad EEO-1 occupational categories as their job groups. See 41 CFR 60-2.12(e).

(FLSA), 29 U.S.C. 214(c), after receiving a certificate from the U.S. Department of Labor's Wage and Hour Division. The certificate allows the payment of special minimum wages to certain workers with disabilities for work being performed. The Department's Wage and Hour Division has jurisdiction over the administration of the FLSA, including the provisions of section 14(c). OFCCP thus has no authority to ban sheltered workshops or prohibit contractors from using them. However, § 60-741.45 of the existing section 503 regulations (renumbered section 60-741.47 in the final rule) addresses the relationship between sheltered workshops and contractors' affirmative action obligations. Specifically, this section provides that "[c]ontracts with sheltered workshops do not constitute affirmative action in lieu of employment and advancement of qualified disabled individuals" in the contractor's workforce. Merely providing a subcontract to a sheltered workshop is, therefore, not a form of affirmative action. Section 60-741.45 further provides that a contract with a sheltered workshop may only be considered to be affirmative action "if the sheltered workshop trains employees for the contractor and the contractor is obligated to hire trainees at full compensation" when they become qualified for the job(s) for which they are being trained. Only after these trainees become employees of the contractor and are receiving full compensation comparable to what other similarly situated employees who did not participate in a sheltered workshop are earning, may they be counted toward the contractor's goal. Contractors may not discriminate in compensation based on disability, which would include discriminating against an individual based on his or her past participation in a sheltered workshop.

Commenters also need not be concerned that contractors could circumvent the goal by means of a subcontractor relationship with a sheltered workshop or by



establishing their own sheltered workshop. First, we note that contractors may only include in their AAPs and count toward their goal their own applicants and employees. Applicants and employees of subcontractors, whether or not that subcontractor is a sheltered workshop, may not be included in the contractor's AAP or counted toward the contractor's goal. Second, to comply with the goal requirement, contractors must apply the goal to each of its job groups, not to its workforce as a whole. Consequently, even if a contractor established its own sheltered workshop inside the company, that would only satisfy the contractor's goal with respect to the specific job(s) performed by the sheltered workshop in the specific contractor facility where the sheltered workshop is located.

- Paragraph (e): Action-oriented programs

Proposed paragraph (e) directed that the contractor develop and execute action-oriented programs designed to correct any identified problem areas when underutilization is identified. The proposed rule stated that examples of such programs may include alternative or additional efforts from among those outreach efforts listed in §§ 60-741.44(f)(1) and 60-741.44(f)(2) and/or any other appropriate actions.

Many commenters opposed to the proposed utilization goal objected in part because proposed paragraph (e) required the development and execution of action-oriented programs when the percentage of individuals with disabilities in one or more job groups fell below the 7 percent utilization goal, regardless of the reason the goal was not met. These commenters argued that proposed paragraph (e) imposed a penalty and therefore, the goal acted more like a quota.

As explained earlier, the goal is not a quota. Nevertheless, it appears that many misunderstood the framework for the goal requirement. To allay these concerns, OFCCP

has revised paragraph (e), renumbered it as paragraph (f), and inserted a new paragraph (e) into the final rule that clarifies that a failure to meet the utilization goal requires that the contractor make an assessment as to whether any impediments to equal employment opportunity exist. This assessment is to be based on reviews the contractor is already required to undertake as part of its annual review of its affirmative action program. These include reviews of its personnel processes (§ 60-741.44(b)) and its external outreach and recruitment efforts (§ 60-741.44(f)), and the results of its affirmative action program audit (§ 60-741.44(h)) and any other areas that might affect the success of the affirmative action program. Paragraph (e) is, thus, captioned “Identification of problem areas.” Proposed paragraph (e), entitled “Action-oriented programs” (paragraph (f) in the final rule) has been revised to direct the contractor to undertake action-oriented programs only when problem areas have been identified. Paragraph (f) also clarifies that action-oriented programs need not be limited to engaging in additional outreach and recruitment efforts. Rather, such programs may also include the modification of personnel processes to ensure equal employment opportunity for individuals with disabilities and/or other actions designed to correct the identified problem areas, such as improving retention of employees with disabilities.

- Paragraph (f): Failure to meet the goal does not constitute discrimination

Proposed paragraph (f) clarified that a contractor’s determination that it has not attained the utilization goal in one or more job groups does not in and of itself constitute either a finding or admission of discrimination in violation of this part. OFCCP received no comments regarding this provision. We have adopted this provision, as proposed, in the final rule, renumbered as paragraph (g). Failure to meet the goal would not be a

violation of this part and would not lead to a fine, penalty or sanction.

As previously noted, if a contractor does not meet the goal, the contractor must take steps to determine whether and where impediments to equal opportunity exist. When making this determination the contractor must assess its personnel processes, the effectiveness of its outreach and recruitment efforts, the results of its affirmative action program audits, and any other areas that might affect the success of the affirmative action program. If the contractor reasonably determines there are no impediments, no further action is necessary. If, as a result of its review, the contractor identifies problem areas, then it must develop and execute action-oriented programs designed to correct the problems, as required by paragraph (f). The contractor may choose the programs to institute. The programs do not need to result in achieving the goal, so long as they are designed to remove obstacles to doing so.

So, for example, if a contractor does not meet the goal, but has developed and implemented an affirmative action program, including conducting outreach and positive recruitment of individuals with disabilities and has evaluated whether barriers to equal opportunity exist and, if they do, implemented action-oriented programs to correct and remove them, the contractor would not be found to be in violation of this part simply because it did not meet the goal.

On the other hand, if, for example, a contractor meets the goal, but fails to develop an AAP, the contractor could be cited for failure to develop an AAP. Goal achievement does not guarantee compliance with section 503 or this part, just as failure to meet the goal does not result in a violation of section 503 or this part.

- Paragraph (g): Utilization goal is not a quota or a ceiling

Proposed paragraph (g) stated that the goal proposed in this section must not be used as a quota or ceiling that limits or restricts the employment of individuals with disabilities. This paragraph is adopted, as proposed, in the final rule, renumbered as paragraph (h).

#### Section 60-741.47 Voluntary affirmative action programs for employees with disabilities

The proposed rule added a new section encouraging contractors to voluntarily develop and implement programs that provide priority consideration to individuals with disabilities in recruitment or hiring. The proposal provided examples of priority consideration programs, and required contractors who elect to implement such a program to include in their AAP a description of the program and an annual report describing activities taken pursuant to the program and their outcomes. In addition, the proposal cautioned that a priority consideration program cannot be used to segregate or restrict the employment opportunities of individuals with disabilities.

We received 28 comments concerning this section, primarily from employer groups, but also from disability groups, law firms, and others. The employer groups overwhelmingly opposed this section, asserting that priority consideration amounted to a quota or preferential treatment for persons with disabilities and contradicted equal employment opportunity principles. Contractors, they stated, should only hire the best qualified person for a job. Commenters opposed to this new provision asserted, further, that it would foster discrimination against other protected groups and generate increased employment discrimination litigation. A few commenters questioned how this section would be implemented; for example, how a contractor would establish a point system.

Some commenters requested clarification on the definition of priority consideration.

Those commenters in favor of this section, mostly disability groups, stated that this section would assist in the employment of persons with disabilities and would not result in unlawful discrimination of any kind. They asserted, further, that this section does not violate section 503 or the ADA.

After consideration of the comments, OFCCP adopts the proposed provision into the final rule with modifications to address concerns raised by contractors. First several contractors were concerned that the provision would require contractors to provide priority consideration to individuals with disabilities, including addition “points” in the hiring process, that would amount to a quota. This is not OFCCP’s intention. By way of background, several contractors in the past have asked OFCCP informally whether it would be permissible to establish a job training or employment program for individuals with specific disabilities, such as traumatic brain injury or developmental disabilities. It has been OFCCP’s longstanding policy that such programs are permissible though not required. To address this concern we have clarified the section to refer to voluntary affirmative action programs for employees with disabilities, rather than as providing priority consideration in employment. In addition, we have removed the example of a program assigning a weighted value or additional “points” to job applicants who self-identify as having a disability. We reiterate that proposed § 60-741.47 (§ 60-741.46 in the final rule) creates no new obligations or responsibilities with which contractors must comply. Rather, it simply highlights the availability to contractors of an important affirmative action tool, and, provides a non-exhaustive list of examples of voluntary affirmative action programs for employees with disabilities that contractors are permitted

to voluntarily develop and implement. A number of private companies have successfully used various types of voluntary affirmative action programs to increase training and employment opportunities for individuals with disabilities, and OFCCP desires to be clear that other companies also may consider their use. However, contractors who do not adopt such programs are not penalized in any way by OFCCP for that decision. OFCCP believes these modifications will allay concerns that this provision amounts to a quota or requires preferential treatment.

We disagree with the suggestion that this provision would foster discrimination against other groups and generate increased litigation. As we noted in the NPRM, the ADA Amendments Act explicitly states that neither the ADA nor the Rehabilitation Act provides “the basis for a claim . . . that [an] individual was subject to discrimination because of the individual’s lack of disability.” ADAAA at sec. 6(a)(1)(g). We note, too, that having a disability is a characteristic that cuts across race, gender and ethnicity lines, and that affirmative efforts to increase employment opportunities for individuals with disabilities will, therefore, not impede affirmative efforts to include women and minorities. We have added a new paragraph (d) to make clear that this section should not be used to foster discrimination against other groups by stating that this section shall not relieve a contractor from liability for discrimination under any of the laws enforced by OFCCP.

#### Section 60-741.48 Sheltered workshops

We proposed to make a single technical change to this existing regulation. Specifically, the NPRM proposed to replace the phrase “qualified disabled individuals” in

the first sentence with “qualified individuals with disabilities” to be consistent with the terminology used elsewhere in this part. We received no comments on this change and it is adopted into the final rule as proposed, but the section is renumbered as § 60-741.47. Several commenters expressed concern about the interaction of this existing provision with the new utilization goal requirement in § 60-741.45 of the final rule (originally proposed as § 60-741.46). Those comments are addressed in the preamble to § 60-741.46, above.

## **Subpart D--General Enforcement and Complaint Procedures**

### **Section 60-741.60 Compliance evaluations**

The proposed rule set forth several changes to the process the contractor and OFCCP will follow in conducting compliance evaluations. We received 28 comments concerning this section, including comments focusing on contractor burden, which are addressed in the Regulatory Procedures section of this preamble. These proposals, the comments to these proposals, and the revisions made to the final rule are discussed in turn below.

- **Paragraph (a)**

The NPRM modified the wording of paragraph (a) to more clearly state the section 503 obligation of the contractor to employ, “advance in employment and otherwise treat qualified individuals without discrimination on the basis of disability in all employment practices.” We received no comments to this paragraph and adopt the language into the final rule as proposed.

- **Paragraph (a)(1): Compliance review**

The NPRM proposed adding a sentence to paragraph (a)(1)(i) regarding the

temporal scope of desk audits performed by OFCCP, stating that OFCCP “may extend the temporal scope of the desk audit beyond that set forth in the scheduling letter if OFCCP deems it necessary to carry out its investigation of potential violations of this part.” Most of the comments concerned this paragraph. Many of these commenters, primarily contractors, employer groups, and law firms, objected to this proposed change and asked that it be withdrawn. These commenters asserted that the language of the proposed rule could result in “perpetual” audits of contractors, was contrary to a recent Administrative Law Judge (ALJ) decision in the case OFCCP v. Frito-Lay, Case No. 2010-OFC-00002, Recommended Decision and Order (ALJ July 23, 2010), and would lead to an increased burden for contractors.

As stated in the NPRM, the purpose of this proposal was to clarify that OFCCP may need to examine information after the date of the scheduling letter during the desk audit in order to determine, for instance, if violations are continuing or have been remedied. While the existing section 503 provision addresses the authority of the agency to conduct desk audits, it does not expressly state the temporal scope of these audits. It has been OFCCP’s longstanding position that the agency has authority to obtain information pertinent to the review for periods after the date of the letter scheduling the review, including during the desk audit. However, in 2010 an ALJ disagreed in a recommended decision in the Frito-Lay case, in part because the parallel Executive Order 11246 desk audit regulation at issue in the case does not address the temporal scope of a desk audit. OFCCP v. Frito-Lay, Inc., Case No. 2010-OFC-00002, ALJ Recommended Decision and Order (July 23, 2010). On May 8, 2012, the Department’s Administrative Review Board (ARB) reversed this recommended decision, concluding that a desk audit



authorized by the regulation permitted OFCCP to request additional information relating to periods after the scheduling letter. The ARB concluded that the regulation does not have an inflexible temporal limitation. OFCCP v. Frito-Lay, Inc., Case No. 2010-OFC-00002, ARB Final Administrative Order (May 8, 2012). OFCCP views the Frito-Lay decision as equally applicable to desk audits concluded under its section 503 authority as to those conducted under its Executive Order 11246 authority. Nevertheless, the final rule makes the clarification explicit in the text of the regulation. OFCCP notes that paragraph (a)(1) also authorizes OFCCP to request during the desk audit additional information pertinent to the review after reviewing the initial submission. See United Space Alliance v. Solis, 824 F.Supp.2d 68, 81-82 (D.D.C. 2011) (holding that agency's interpretation of its desk audit regulation to authorize additional information requests when necessary was entitled to deference).

Finally, commenters' concerns that this revision will lead to "never-ending" audits are unfounded. As stated above, the clarifying language set forth in the final rule does not change OFCCP's longstanding policy, or contractors' obligations, regarding the temporal scope of the desk audit. Further, because the clarification does not represent a change, concerns about increases in burden are similarly unfounded.

- Paragraphs (a)(3) and (a)(4): Compliance check and focused reviews

The NPRM revised paragraph (a)(3) to permit OFCCP to review documents pursuant to a compliance check either on-site or off-site, at OFCCP's option. Similarly, paragraph (a)(4) was revised to allow OFCCP to conduct focused reviews, at its discretion, either on-site or off-site. Many employer groups objected to this change, citing confidentiality concerns over the transfer, management, and maintenance of

employment and medical records. Some commenters requested safeguards to protect these records, asked for additional guidance concerning confidentiality of medical records, or asked that these records not be subject to the Freedom of Information Act.

We received similar comments concerning the confidentiality of records with regard to § 60- 741.81, Access to records, and we address those comments in more detail in the preamble to that section. Briefly, we note that the section 503 regulations have long required contractors to provide relevant medical and related records to OFCCP officials during a compliance evaluation or complaint investigation “upon request.” § 60- 741.23(d)(1)(iii). This regulation contains no requirement that OFCCP must request such records “on-site.” We also note that there is significant precedent for OFCCP obtaining contractor records off-site, as the scheduling letter has long required that contractors scheduled for a compliance evaluation send their AAPs and supporting documentation to OFCCP. The final rule adopts the changes to these paragraphs as proposed.

- Paragraph (c): Pre-award compliance evaluations

Finally, the proposed rule added a new paragraph (c) to this section detailing a new procedure for pre-award compliance evaluations under section 503, much like the procedure that currently exists in the Executive Order regulations. See 41 CFR 60- 1.20(d). A few employer groups objected to the change, asserting that the new paragraph was too prescriptive and questioned how the procedure would work in practice.

These concerns are misplaced. The pre-award compliance evaluation is a long-standing requirement under the Executive Order. This addition simply brings the section 503 regulations in line with the Executive Order regulations and assures that the pre-award compliance evaluation process will also encompass compliance with section 503.

OFCCP adopts this new provision into the final rule as proposed.

#### Section 60-741.62 Conciliation Agreements

The proposed rule renumbered the existing rule as paragraph (a), and added a new paragraph (b) permitting the establishment of benchmarks in conciliation agreements as one possible form of remedial action. As we stated in the NPRM, benchmarks may be established for outreach, recruitment, hiring, or other employment activities of the contractor, as appropriate, and will provide a quantifiable method for measuring the contractor's progress toward correcting identified violations or deficiencies.

We received five comments from employer groups concerning new paragraph (b). None favored the new provision. Some of these commenters asserted that remedial benchmarks for hiring are unnecessary, would be similar to a quota, and recommended that the paragraph be eliminated from the final rule. Others requested that we further define "benchmark," or clarify that a benchmark must be linked to a finding of discrimination.

The use of remedial benchmarks is not a new OFCCP policy or practice. Remedial benchmarks have long been included in conciliation agreements, when appropriate, to resolve violations under the Executive Order. New paragraph (b) simply clarifies that remedial benchmarks may also be used, when appropriate, to remedy violations of section 503. Lastly, we note that § 60-741.62(a) provides that conciliation agreements may be used when "OFCCP finds a material violation of the act or this part." We, therefore, do not believe that further clarification regarding when a benchmark may be used is warranted. Nor do we believe that additional definition of the term "benchmark," which the American Heritage Dictionary of the English Language defines

“a standard by which something can be measured or judged,” is necessary. Accordingly, paragraph (b) is adopted into the final rule as proposed.

#### Section 60-741.68 Reinstatement of ineligible contractors

The proposed rule added a sentence at the end of paragraph (a) to clarify that the Director shall issue a written decision on a contractor’s request for reinstatement. No comments were received regarding this change, and OFCCP adopts it into the final rule as proposed.

### **Subpart E--Ancillary Matters**

#### Section 60-741.80 Recordkeeping

This section describes the recordkeeping requirements that apply to the contractor under section 503, and the consequences for the failure to preserve records in accordance with these requirements. The NRPM modified this provision to incorporate the five (5) year records retention timeframe required under proposed § 60-741.44(f)(4) (linkage agreements and other outreach and recruiting efforts), and proposed § 60-741.44(k) (collection of referral, applicant and hire data).

While comments regarding the proposed recordkeeping requirements under § 60-741.44(f)(4) and § 60-741.44(k) are addressed in the discussions of those provisions, a total of 25 comments were received specific to § 60-741.80. Commenters included disability, employer, veterans and other associations, contractors, law firms, government offices and individuals. Generally, the disability and veterans associations favored the longer record retention period, while other commenters argued that this was overly

burdensome, inconsistent with OFCCP's other recordkeeping requirements, and confusing.

As previously noted in this preamble, in response to comments regarding the burden associated with maintaining records for five years, the final rule reduces the recordkeeping requirements for §§ 60-741.44(f)(4) and 60-741.44(k) to three years. To reduce any potential for confusion, the final rule includes a new paragraph (b) in § 60-741.80 specifying in one place those records that have the three-year requirement, and renumbering paragraph (b) of the existing rule as paragraph (c). OFCCP feels strongly that extending the recordkeeping requirements for these particular provisions, which are primarily related to recruitment and outreach, will enable contractors to better determine the effectiveness of their recruitment and outreach activities over time. As noted in the NPRM, the absence of data makes it nearly impossible for contractors and OFCCP to perform even rudimentary evaluations of the availability of individuals with disabilities in the workforce, or to make any quantitative assessments of how effective contractor outreach and recruitment efforts have been in attracting candidates with disabilities. These records will give contractors historical data that can be used for analyzing their compliance efforts.

Paragraph (d) of the existing rule provides that the "requirements of this section shall apply only to records made or kept on or after August 19, 1996," the effective date of a previous amendment to the section 503 implementing regulations. The final rule deletes this paragraph, as it is now obsolete.

## Section 60-741.81 Access to records

This section describes a contractor's obligations to permit OFCCP to access its records during compliance evaluations and complaint investigations. The NPRM proposed two changes to the current regulation. First, it added a sentence requiring the contractor to provide off-site access to materials if requested by OFCCP investigators or officials as part of a compliance evaluation or complaint investigation. Second, it required that the contractor specify to OFCCP all formats (including specific electronic formats) in which its records are available, and produce records to OFCCP in the formats selected by OFCCP.

Sixteen comments were received from contractors, employer associations and law firms regarding this proposal. Most of the commenters requested that OFCCP eliminate the proposed changes. A few commenters objected specifically to the requirement to provide records in the format(s) OFCCP selects, and almost all expressed concern that allowing OFCCP access to records off-site raised potential confidentiality risks.

The final rule retains the proposed requirement that contractors provide OFCCP off-site access to materials upon request. As an initial matter, we note that access to company records off-site is not a novel approach, as Executive Order 11246 contains no limitation on the location of access to records for a scheduled compliance evaluation, and indeed specifically references off-site access. The final rule's general access regulation conforms to those principles. Moreover, in light of contractors' increased use of readily portable electronic records in multiple locations, this change will provide OFCCP with greater flexibility during evaluations and investigations, promoting increased efficiency.

However, OFCCP modified § 60-741.81 of the final rule in response to concerns

regarding record confidentiality. Section 60-741.81 now includes the following language: “OFCCP will treat records provided by the contractor to OFCCP under this section as confidential to the maximum extent the information is exempt from public disclosure under the Freedom of Information Act, 5 U.S.C. 552.” It is the practice of OFCCP not to release data where the contractor is still in business, and the contractor indicates, and through the Department of Labor review process it is determined, that the data are confidential and sensitive and that release of the data would subject the contractor to commercial harm. This language affirms OFCCP’s commitment to ensure confidentiality to the fullest extent allowed by law. Further, all OFCCP Compliance Officers receive training on the importance of keeping records confidential during compliance evaluations and complaint investigations. OFCCP will continue to stress this policy to ensure that contractor records are kept secure by the agency at all times.

The final rule also clarifies the provision regarding OFCCP’s ability to request records in specific formats. The final rule states that: “[t]he contractor must provide records and other information in any of the formats in which they are maintained, as selected by OFCCP.” This language makes clear that the provision will not require contractors to invest time or resources creating records in a specific format, or creating a documented “list” of the formats in which they have documents available. Rather, contractors merely need to inform OFCCP of the formats in which they maintain their records and other information, and allow OFCCP to select the format(s) in which the records or other information will be provided. This provision should result in more efficient OFCCP evaluations and investigations.

## **Appendix A to Part 60-741--Guidelines on a Contractor's Duty to Provide Reasonable Accommodation**

The proposed rule included several changes to Appendix A to reflect updated terminology and revisions made elsewhere in the regulations. Specifically, we: (1) proposed changing the term “otherwise qualified” to “qualified,” in paragraph 1, to conform more closely to the terminology used in the ADA, as amended, and this part; (2) added a reference to the proposed new requirement, in proposed § 60-741.45, that contractors develop written reasonable accommodation procedures; (3) proposed revising paragraph 2 to reflect the new requirement, in § 60-741.42, that contractors invite applicants to self-identify as an individual with a disability at the pre-offer stage; (4) noted that the invitation to self-identify also invites individuals with disabilities to request any reasonable accommodation that they might need; (5) proposed requiring, in paragraph 4, that, in the event that a needed reasonable accommodation constitutes an undue hardship for the contractor, the individual with a disability be given the option of providing the accommodation or paying the portion of the cost that constitutes the undue hardship for the contractor; (6) proposed revising paragraph 5 to require the contractor to seek the advice of the individual with a disability when providing reasonable accommodation; (7) proposed changing the reference to “§ 60-741.2(v)” in paragraphs 5 and 8 of the appendix to “§ 60-741.2(t)” to reflect the revised alphabetical structure of the rule’s definitions; and (8) updated the reference to various information resources, and replaced the term “TDD” with “TTY” to reflect current technology.

Just one commenter addressed the proposed revisions to Appendix A. This commenter recommended that we add a network of State vocational rehabilitation



agencies to the examples of reasonable accommodation resources referenced in paragraph 5. OFCCP declines to add this reference as State vocational rehabilitation services agencies are already listed as a reasonable accommodation resource for contractors. OFCCP, therefore, adopts the proposed changes into the final rule with the following modifications: (1) the reference to the proposed requirement to establish written reasonable accommodation procedures is deleted, consistent with the elimination of proposed § 60-741.45; (2) the third sentence of paragraph 2 is revised to reflect the use of a single voluntary self-identification form for the pre-offer and post-offer invitations to self-identify as an individual with a disability; and (3) the reference to the definition of “reasonable accommodation” is renumbered § 60-741.2(s).

## **REGULATORY PROCEDURES**

### **Executive Order 13563 and Executive Order 12866**

Executive Order 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; tailor the regulation to impose the least burden on society, consistent with obtaining the regulatory objectives; and, in choosing among alternative regulatory approaches, select those approaches that maximize net benefits. Executive Order 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

This rule is economically significant as it will have an annual effect on the economy of \$100 million or more. EO 12866 sec. 3 at (f). In this section, we present a

summary of the costs and benefits associated with the revisions to part 60-741. OFCCP estimates that first-year costs in the rule to be in the range of \$349,510,926 to \$659,877,833. This includes 1) one-time costs; 2) recurring costs; 3) capital start-up costs; and 4) operations and maintenance costs.<sup>31</sup> The recurring costs in years contractors do not invite all employees to voluntarily self-identify as an individual with a disability will range from \$162,371,816 to \$395,258,387. The recurring costs in the years that contractors do invite all employees to voluntarily self-identify as an individual with a disability will range from \$242,345,778 to \$480,476,442.

#### **A. Introduction**

The final regulatory impact analysis is substantially different from the preliminary regulatory impact analysis presented in the section 503 NPRM based on comments received during the public and interagency comment period. First, the final rule has been scaled down significantly so that it focuses on requirements essential to creating accountability, and supporting the ability of contractors to conduct meaningful self-assessments using more data. This rule also minimizes the costs to contractors while not sacrificing the agency's ability to conduct effective compliance evaluations. A detailed discussion of the proposals in the NPRM that OFCCP did not adopt in the final rule is included in the Discussion of Impacts section below. Second, OFCCP increased the number of contractor establishments affected by the rule to take into account some of the public comments at the NPRM phases of the rulemaking. Third, the analysis acknowledges that some establishments and/or companies may incur higher costs under the final rule and illustrates a range of costs to implement several provisions. The

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<sup>31</sup> These costs include both establishment and contractor company level costs.

analysis considers, when appropriate, costs that may be incurred by contractors' headquarters versus establishments, and differences between contractors with automated human resources and systems and those with manual systems.

1. Eliminated Several Proposals in the NPRM

While all the proposals in the NPRM had value, after assessing the comments received on the NPRM published on December 9, 2011, we made several changes in the final rule. OFCCP reconsidered whether the cost of several proposals in the NPRM could be justified by their potential benefits, and whether alternative methods or approaches could achieve comparable or acceptable benefits for less cost or burden. We retain in the final rule those provisions proposed in the NPRM that create greater contractor accountability through enhanced data collection and recordkeeping. Therefore, as an example, the final rule does not require each contractor to establish three "linkage" agreements with various disability service organizations to facilitate disability recruitment.

Other examples of how the final rule takes a tailored approach include, but are not limited to, eliminating the proposal that contractors reproduce the entire equal opportunity clause in all contracts and subcontracts; the proposal that contractor staff training must cover a list of specific training items; the proposal to mandate the adoption of written reasonable accommodation procedures; the proposal to mandate annual reviews of personnel policies; and the proposal to mandate that contractors identify the official responsible for the affirmative action program on all communications are also eliminated in the final rule.

2. Increased the Contractor Establishment Count

OFCCP received comments on the estimated number of contractor establishments, including a recommendation to accept a count of 285,390 using the Veterans Employment Training Services (VETS) annual report. While OFCCP declines to exclusively rely on the VETS report, we present an estimated high end for the range of the cost of the rule based on a contractor establishment number of 251,300. This number is based on 2010 VETS data from their pending Information Collection Request.<sup>32</sup>

All costs and hours in the burden analysis of this final rule are calculated using these revised numbers for Federal contractor establishments. Federally-assisted construction contractors are not subject to these regulations and, therefore, are not included in this total. See §60-741.2(i) for the definition of “Government contract.”

### 3. Revised and Increased Burden Estimates

OFCCP received approximately 130 comments on the burden imposed by the section 503 NPRM from individuals, disability associations, companies and industry groups. A few commenters stated that the benefits of the proposed rule outweigh the costs. The majority of comments on the burden of the proposed rule expressed different views. Commenters noted that OFCCP dramatically underestimated the burden associated with the rule. Several commenters provided their own burden estimates, though often with little discussion or explanation of their methodology, that they asserted more accurately reflected the impact that the proposed provisions would have on contractors. The estimates provided by commenters were significantly higher than those used in the NPRM and resulted in total costs that far exceeded the NPRM’s estimate.

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<sup>32</sup>OMB Control Number 1293-0005, Federal Contractor Veterans’ Employment Report, VETS - 100/VETS-100A , [http://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201104-1293-003](http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201104-1293-003) (last accessed Aug. 13, 2013).

Commenters also expressed concern that the proposals in the NPRM seeking to require contractors to collect data and engage in other personnel activities would change their business functions and would not lead to jobs for individuals with disabilities.

Commenters especially emphasized the costs of modifying their existing human resources information systems in order to collect new categories of data on individuals with disabilities.

OFCCP acknowledges that it is challenging to estimate the precise amount of time each establishment or headquarters, as appropriate, will take to engage in certain activities. However, in response to public comments, the final regulatory impact analysis attempts to account for the fact that smaller contractors may not have the same human resources capabilities as larger contractors. OFCCP does so by providing low and high range estimates for certain requirements. This approach is taken to distinguish between contractors with automated application and human resources information systems represented at the low end of the range in terms of burden, and contractors with manual systems represented at the high end of the range. The distinction is applied, for example, when estimating burden related to meeting the data collection requirements of the final rule. The high end of the range estimate is based on the assumption that smaller contractors with 50-100 employees may still use manual application or human resources processes. These contractors would likely expend more time conducting the kind of data collection and analysis required under the final rule. The range also factors in varying estimates for the number of applicants who would fill out the invitation to self-identify.

In addition, as mentioned earlier, OFCCP presents burden estimates based on two different contractor establishment numbers in order to reflect the range of opinions about the size of the universe of contractors affected by this rule.

Elsewhere in this issue of the Federal Register, OFCCP is publishing a final rule amending the VEVRAA implementing regulations at 41 CFR part 60-300. Many of the revisions contained in this section 503 final rule mirror revisions contained in the VEVRAA final rule. In consideration of the fact that contractors will, thus, already be required to perform certain activities, OFCCP eliminated the burden in this analysis for provisions that mirror requirements in part 60-300. OFCCP also decreased the burden for one-time or capital and start-up costs that are substantially similar to those that are already required under the VEVRAA final rule.

## **B. The Need for the Regulation**

Employment discrimination and underutilization of qualified workers, such as individuals with disabilities and veterans, contribute to broader societal problems such as income inequality and poverty. The median household income for “householders” with a disability, aged 18 to 64, was \$25,420 compared with a median income of \$59,411 for households with a householder who did not report a disability.<sup>33</sup> Controlling for age and race we find that workers with a disability, on average, earn less than private sector workers without a disability. The mean hourly wage of those with a disability is \$17.62 (with a median of \$13.73) compared to \$21.67 (median \$16.99) for those without a

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<sup>33</sup> Income, Poverty and Health Insurance Coverage in the United States: 2011, Current Population Reports, issued September 2012, <http://www.census.gov/prod/2012pubs/p60-243.pdf> (last accessed July 8, 2013), p. 10. A “householder” is the person (or one of the people) in whose name the home is owned or rented and the person to whom the relationship of other household members is recorded. Typically, it is the head of a household. Only one person per household is designated the “householder.”

disability.<sup>34</sup> Controlling for age and race, male workers with a disability earn 23 percent less than males without a disability. The disability gap for females is 20 percent.<sup>35</sup> While 28.8 percent of individuals, ages 18 to 64, with a disability were in poverty in 2011, the data show that 12.5 percent of those individuals without a disability were in poverty.<sup>36</sup>

Based on our analysis of the American Community Survey (ACS) 2008-2010 Public Use Microdata (PUMS), and controlling for age and race we found that:<sup>37</sup>

- Males with disability had a 7.2 percentage point higher unemployment rate than males without a disability.
- Females with disability had a 6.5 percentage point higher unemployment rate than females without a disability.
- Females with a disability had a 29.2 percentage point higher probability of not being in the labor force than females without a disability.

A 2009 report found that “having a disability is associated with lower earnings due to decreased ability to work, prejudice, and other factors.”<sup>38</sup> There are a number of

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<sup>34</sup> OFCCP ran wage regressions using the natural log of effective hourly wages calculated as real income divided by usual hours per week and weeks per year. The weeks per year variable is categorical so the midpoint of each category was used as a proxy for the number of weeks worked. Explanatory variables include age and race. The sample was restricted to individuals aged 18 to 64 employed in the private sector. Individuals currently in the armed forces were not included in the sample. All OFCCP models used ACS 2008-2010 Public Use Microdata (PUMS).

<sup>35</sup> Id.

<sup>36</sup> Income, Poverty and Health Insurance Coverage in the United States: 2011, Current Population Reports, issued September 2012, <http://www.census.gov/prod/2012pubs/p60-243.pdf> (last accessed July 8, 2013)

<sup>37</sup> OFCCP ran wage regressions using the natural log of effective hourly wages calculated as real income divided by usual hours per week and weeks per year. The weeks per year variable is categorical so the midpoint of each category was used as a proxy for the number of weeks worked. Explanatory variables include age and race. The sample was limited to individuals aged 18 to 64 employed in the private sector. All OFCCP models used ACS 2008-2010 Public Use Microdata (PUMS).

<sup>38</sup> Changing Demographic Trends that Affect the Workplace and Implications for People with Disabilities, Executive Summary (Nov. 30, 2009), p. 4. “Studies agree that disability incidence is related to income and earnings. A number of intertwined relationships, however, make it somewhat difficult to sort out cause and effect.”

hypotheses concerning disparities in labor force participation, employment rates, and wages. While knowledge of opportunities, differences in access and attainment of training and education, and underutilization of individuals with disabilities likely contribute to these disparities, the culture of the typical workplace and discrimination are also factors in some employment settings. However, there is little empirical data upon which to base targeted interventions. Data collection remains a critical need.

The final rule is intended to provide contractors with the tools needed to evaluate their own compliance and proactively identify and correct any deficiencies in their employment practices. Because the existing regulations implementing section 503 do not provide contractors with adequate tools to assess whether they are complying with their nondiscrimination and affirmative action obligations to recruit and employ qualified individuals with disabilities, the revisions of the final rule will assist contractors in averting potentially expensive violation findings by OFCCP.

### **C. Discussion of Impacts**

In this section, OFCCP presents a summary of the costs associated with the revisions to part 60-741. The estimated cost to contractors is based on Bureau of Labor Statistics data in the publication “Employer Costs for Employee Compensation” (September 2011), which lists total compensation for management, professional, and related occupations as \$50.11 per hour and administrative support as \$23.72 per hour. OFCCP estimates that 52 percent of the burden hours will be management, professional, and related occupations and 48 percent will be administrative support.

### **Table 1: Contractor New Requirements – 171,275 Establishments**



Burden	Low Cost	High Cost
<b>One-Time Burden</b>		
<b>EO Clause, Parag 10 (Include “Disability” EEO Statement)</b>	\$320,660.14	\$320,660.14
<b>741.5(d) (Modify EO Clause)</b>	\$1,603,263.00	\$1,603,263.00
<b>741.42 (Modify Application Systems)</b>	\$2,101,102.72	\$2,583,328.54
<b>Total</b>	<b>\$4,025,025.86</b>	<b>\$4,507,251.68</b>
<b>Recurring Burden</b>		
<b>741.42 (Invitation to Self-Identify)</b>	\$9,619,542.08	\$9,619,542.08
<b>741.42 (Invitation to Self-Identify Employee Burden)</b>	\$68,751,157.00	\$68,751,157.00
<b>741.42 (Recordkeeping)</b>	\$1,603,263.25	\$1,603,263.25
<b>741.44(f) (Review Outreach and Recruitment)</b>	\$3,174,438.00	\$3,174,438.00
<b>741.44(f)(4) (Outreach and Recruitment Recordkeeping)</b>	\$1,068,842.17	\$1,068,842.17
<b>741.44(h) (AAP Audit Recordkeeping)</b>	\$1,068,842.17	\$1,068,842.17
<b>741.44(k) (Data Collection and Analysis)</b>	\$3,740,925.75	\$6,840,549.94
<b>741.45 (Utilization Analysis)</b>	\$6,413,015.00	\$8,978,223.00
<b>741.45 (Utilization Analysis Recordkeeping)</b>	\$1,068,842.00	\$1,068,842.00
<b>Total</b>	<b>\$96,508,867.42</b>	<b>\$102,173,699.61</b>
<b>Capital and Start-up</b>	<b>\$28,312,120.00</b>	<b>\$39,086,481.00</b>
<b>Rule Familiarization</b>	<b>\$8,582,590.25</b>	<b>\$34,330,361.00</b>
<b>Operations and Maintenance</b>	<b>\$616,590.00</b>	<b>\$1,356,498.00</b>
<b>Reasonable Accommodations</b>	<b>\$114,770,291.00</b>	<b>\$114,770,291.00</b>
<b>Total</b>	<b>\$252,815,484.53</b>	<b>\$296,224,582.29</b>

**Table 2: Contractor New Requirements – 251,300 Establishments**

Provision	Low Cost	High Cost
<b>One-Time Burden</b>		
<b>EO Clause, Parag 10 (Include “Disability” EEO Statement)</b>	\$470,468.00	\$470,468.00
<b>741.5(d) (Modify EO Clause)</b>	\$784,115.00	\$784,115.00
<b>741.42 (Modify Application Systems)</b>	\$3,102,510.41	\$3,814,616.30
<b>Total</b>	<b>\$4,357,093.41</b>	<b>\$5,069,199.30</b>
<b>Recurring Burden</b>		
<b>741.42 (Invitation to Self-Identify)</b>	\$14,114,063.00	\$14,114,063.00
<b>741.42 (Invitation to Self-</b>	\$68,751,667.00	\$68,751,667.00

<b>Identify Employee Burden)</b>		
<b>741.42 (Recordkeeping)</b>	\$2,352,344.00	\$2,352,344.00
<b>741.44(f) (Review Outreach and Recruitment)</b>	\$4,704,687.82	\$4,704,687.82
<b>741.44(f)(4) (Outreach and Recruitment Recordkeeping)</b>	\$1,568,229.27	\$1,568,229.27
<b>741.44(h) (AAP Audit Recordkeeping)</b>	\$1,568,229.27	\$1,568,229.27
<b>741.44(k) (Data Collection and Analysis)</b>	\$5,488,802.46	\$10,036,667.35
<b>741.45 (Utilization Analysis)</b>	\$9,409,375.64	\$13,173,125.90
<b>741.45 (Utilization Analysis Recordkeeping)</b>	\$1,568,229.27	\$1,568,229.27
<b>Total</b>	\$109,525,627.73	\$117,837,242.88
<b>Capital and Start-up</b>	\$41,555,091.78	\$57,716,207.82
<b>Rule Familiarization</b>	\$12,592,643.00	\$50,370,572.00
<b>Operations and Maintenance</b>	\$904,680.00	\$1,990,296.00
<b>Reasonable Accommodation</b>	\$114,770,291.00	\$114,770,291.00
<b>Costs to Companies</b>	<b>\$283,705,426.92</b>	<b>\$347,753,809.00</b>

**Table 3: Completing Pre-offer Self-Identification**

	<b>171,275 Establishments</b>		<b>251,300 Establishments</b>	
<b>Provision</b>	<b>Low Cost</b>	<b>High Cost</b>	<b>Low Cost</b>	<b>High Cost</b>
<b>741.42(a)</b>	\$96,695,442.00	\$212,729,213.00	\$141,874,556.25	\$312,124,023.75

1. Regulatory Familiarization

Several commenters noted that the proposed rule did not quantify the burden of reading and understanding the section 503 revisions on contractors. OFCCP acknowledges that 5 CFR 1320.3(b)(1)(i) requires agencies to include in the burden analysis for new information collection requirements the estimated time it takes for

contractors to review and understand the instructions for compliance. In order to minimize the burden, OFCCP will publish compliance assistance materials including, but not limited to, factsheets and “Frequently Asked Questions.” OFCCP will also host webinars for the contractor community that will describe the key provisions in the final rule, and conduct listening session to identify any specific challenges contractors believe they face, or may face, when complying with the requirements of the final rule

OFCCP estimates it will take, at a minimum, 1 hour to have a management professional at each establishment either read compliance assistance materials provided by OFCCP or participate in an OFCCP webinar to learn about the new requirements of the final rule. OFCCP believes that this is a reasonable estimate since there are substantially fewer new requirements in the final rule than proposed in the NPRM, and contractors already have at least one person that is responsible for overseeing their compliance with OFCCP’s regulations. The estimated cost of this burden is based on data from the Bureau of Labor Statistics in the publication “Employer Costs for Employee Compensation” (September 2011), which lists total compensation for a management professional at \$50.11. Therefore, the estimated burden for rule familiarization is 171,275 hours (171,275 contractor establishments x 1 hour = 171,275 hours). We calculate the total estimated minimum costs as \$8,582,590 (171,275 hours x \$50.11/hour = \$8,582,590) or \$50 per establishment.

Commenters suggested that reviewing the requirements of the final rule would take up to 6 hours. OFCCP declines to adopt this calculation since it is based on reviewing the proposed rule which included a significant number of additional requirements that are not in the final rule. Therefore, OFCCP estimates the maximum for

reviewing the rule would be 4 hours for a total of 685,100 (171,275 contractor establishments x 4 hour = 685,100 hours). We calculate the total maximum estimated start-up costs as \$34,330,361 (685,100 x \$50.11/hour = \$34,330,361) or \$200 per establishment

Assuming there are 251,300 establishments impacted by the final rule, the estimated minimum burden for rule familiarization would be 251,300 hours (251,300 contractor establishments x 1 hour = 251,300 hours). The total estimated minimum costs would be \$12,592,643 (251,300 hours x \$50.11/hour = \$12,592,643) or \$50 per establishment. OFCCP estimates the maximum for reviewing the rule would be 4 hours for a total of 1,005,200 hours (251,300 contractor establishments x 4 hour = 1,005,200 hours). The total maximum estimated maximum costs would be \$50,370,572 (1,005,200 hours x \$50.11/hour = \$50,370,572) or \$200 per establishment.

## 2. Section 60-741.5 Equal opportunity clause (EO Clause)

### EO Clause, Paragraph 4

Paragraph 4 of the final rule clarifies the contractor's duty to provide notices of employee rights and contractor obligations in a manner that is accessible and understandable to persons with disabilities. The final rule revises the parenthetical at the end of the sentence by replacing the outdated suggestion of "hav[ing] the notice read to a visually disabled person" as an accommodation with the suggestion to provide Braille, large print, or other versions that allow persons with disabilities to read the notices themselves. The NPRM estimated that it would take contractors ten (10) minutes to receive an accommodation request and maintain records of compliance.

Upon further consideration, OFCCP determines that there are no new costs related

to this provision. The nondiscrimination requirements of section 503 currently require contractors to provide reasonable accommodation. See 41 CFR 60-741.21(f). This modification simply updates the example of a possible accommodation that contractors may provide to a visually impaired person, and does not impose any new obligation on contractors.

Paragraph 4 of the final rule also allows contractors to post notices regarding employee rights and their equal employment opportunity obligations electronically if the contractor has actual knowledge that employees will have access to them. OFCCP estimates no additional burden for contractors that opt to post relevant notices electronically. This provision simply provides contractors with another, more expedient, means to meet its existing obligations.

Paragraph 4 of the final rule requires contractors to electronically post a notice of job applicants' rights if the contractor utilizes an electronic application. The existing regulations require contractors to post notices regarding employee rights and equal employment opportunity obligations in conspicuous places for employees and applicants. See 41 CFR 60-741.5(a)(4). The final rule clarifies how contractors can meet this existing obligation for on-line applicants. Therefore, there is no new burden for this provision.

#### EO Clause, Paragraph 7

Under existing Federal requirements, including EO 11246, contractors are required to state in solicitations and advertisements that the company is an equal opportunity employer. See 41 CFR 60-1.4(a)(2). The NPRM proposed adding a new paragraph 7 to the EO Clause that would require the contractor to also state in

solicitations and advertisements that it is an equal opportunity employer of individuals with disabilities. The NPRM estimated that it would take contractors five (5) minutes to comply with this provision. A few commenters noted that this would increase the costs of solicitations and advertisements since some newspapers and other publications charge for each word of a solicitation.

The final rule incorporates the requirement for contractors to state in all solicitations and advertisements that the company is an equal opportunity employer of individuals with disabilities. OFCCP acknowledges that some contractors may experience an increased cost in light of this requirement. However, there is no indication based on the comments that OFCCP received on this issue that this would be a significant problem for a substantial number of contractors. In fact, the cost of many advertisements and solicitations are based on size (i.e., quarter-page, half-page, full-page) or by listing, rather than the number of words in the text. Moreover, the cost of an advertisement will also depend on the publication's circulation and location. The number of words in the text actually appears to be a lesser factor when determining cost. After some research, OFCCP determined that the average cost per word nationally is between 10 and 20 cents for a classified advertisement. Therefore, the cost would not be greatly impacted by adding individuals with disabilities to the affirmative action statement in advertisements.

Information from OFCCP field staff indicates that many contractors already include "disabilities" in their equal employment opportunity statement for solicitations. Therefore, based on field experience evaluating contractor practices, OFCCP estimates that approximately 40 percent of contractor establishments, or 68,510, currently comply with this requirement. OFCCP estimates that the remaining 102,765 contractor

establishments will have a one-time burden of 5 minutes for amending their existing standard equal employment opportunity statement to include “individuals with disabilities” or similar language. Therefore, the total burden for this provision is 8,564 hours (102,765 contractor establishments x 5 minutes/60 = 8,564 hours). The cost for this provision is approximately \$320,660.

Assuming there are 251,300 contractor establishments impacted by the final rule, the burden for this provision would be 12,565 hours (150,780 contractor establishments x 5 minutes/60 = 12,565 hours). The total cost of the provision would be \$470,469.

#### Section 60-741.5(d)

The NPRM proposed requiring the entire EO Clause be included verbatim in Federal contracts. The NPRM estimated that it would take contractors 5 minutes to download and incorporate the required text in contract templates. OFCCP received nineteen comments regarding the proposed provision. Commenters primarily asserted that the proposed requirement would be too burdensome, since the length of contracts would increase significantly, and requested that incorporation by reference be retained. In response to these comments, the final rule permits incorporation of the EO Clause by reference with the addition of some additional language that OFCCP has provided in the regulatory text summarizing VEVRAA’s purpose. OFCCP estimates that contractors will spend approximately 15 minutes modifying existing contract templates to ensure the additional language is included. The burden for this provision is 42,819 hours (171,275 contractor establishments x 5 minutes/60 = 42,819 hours). The cost for this provision is \$1,603,263.

Assuming there are 251,300 contractor establishments impacted by the final rule, the burden for this provision would be 20,942 hours (251,300 contractor establishments x 5 minutes/60 = 20,942 hours). The cost for this provision would be \$784,115.

3. Section 60-741.41 Availability of the affirmative action program

The NPRM proposed requiring contractors to inform off-site employees of the availability of the affirmative action program for review. The burden for this provision was accounted for in the Paperwork Reduction Act Analysis of the VEVRAA NPRM. The final rule does not incorporate this proposal. Instead, the final rule retains the language in the existing § 60-741.41, but notes that the data metrics required by § 60-741.44(k) are not required to be made available to the contractor's employees or applicants. Therefore, no new burden is created.

4. Section 60-741.42 Invitation to self-identify

The NPRM proposed several significant revisions to this section, including requiring the contractor to invite all applicants to self-identify as an individual with a disability prior to an offer of employment and adding a new requirement for contractors to annually invite all employees to self-identify as an individual with a disability, among other things. The NPRM estimated that it would take 5 minutes for the contractor to download and save the text prescribed by OFCCP for the invitation to self-identify into a separate document that it can store electronically, include it in electronic applications, or print out to include in a hard copy application package, as needed. The NPRM further estimated that it would take contractors 5 minutes to download and save the prescribed text for the annual survey to invite employees to self-identify as an individual with a disability. Finally, the NPRM estimated that it would take contractors 1 minute to



maintain the self-identification forms.

Several commenters expressed concern about the burden associated with the pre-offer invitation to self-identify. Commenters stated that OFCCP's estimate of 5 minutes was unreasonable. Commenters asserted that the pre-offer invitation to self-identify would require substantial modifications to contractors' application systems. Human resources personnel would also have to expend time and resources gathering and filing the documents. Commenters further asserted that the administrative costs would greatly outweigh the benefits of the pre-offer self-identification. At least two commenters stated that the pre-offer self-identification should not present a significant burden since contractors currently invite individuals to self-identify their race, gender, and status as a protected veteran.

The final rule adopts the voluntary, pre-offer self-identification invitation requirement. See 41 CFR 60-741.42 (a). However, in order to ease the burden on contractors, OFCCP is creating a single, one-page form entitled "Voluntary Self-Identification of Disability." This standard form will be used for the pre-offer, post-offer, and the invitation to self-identify; it will be made available on the OFCCP Web site. This should decrease the administrative time that contractors will need to spend putting policies and procedures in place to comply with this requirement.

OFCCP modified its approach to this calculation to specifically distinguish between contractors with web-based or automated systems and those relying on manual or paper-based systems. Larger contractors, those with more than 100 employees are more likely to have web-based systems. OFCCP estimates that 72 percent of contractor

companies utilize Web-based application systems.<sup>39</sup> Working at the corporate level, contractors will take 1.5 hours to review and retrieve existing sample invitations to self-identify, adopt the sample “as is” or make revisions to their existing form, save the invitation to self-identify and incorporate the document in the contractor’s application form. This burden estimate should be considered in conjunction with the start-up costs associated with this rule. OFCCP allotted 18 hours in the section 503 final rule to modify human resources information systems or establish a process to comply with the rules’ new data collection requirements. This is in addition to costs specified for incorporating the invitation to self-identify in the application process. Taken together, contractors will have over 21 hours to modify their existing application process. The burden for these contractors would be 49,676 hours (33,117 contractor companies x 1.5 hours = 49,676 hours). The remaining contractors would simply have to incorporate the invitation to self-identify in paper applications. OFCCP estimates this will take approximately 30 minutes. The burden for these contractors would be 6,440 hours (12,879 x 30 minutes/60 = 6,440 hours). The minimum cost for this provision is approximately \$2,101,103. If all contractors used a web-based application the one-time burden of preparing the form and making the IT changes for this provision is 68,994 hours (45,996 contractor companies x 90 minutes/60 = 68,994 hours). The maximum cost for this provision is \$2,583,328.

Assuming there are 251,300 contractor establishments, or 67,919 contractor companies,<sup>40</sup> in OFCCP’s jurisdiction, contractors working at the corporate level, will

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<sup>39</sup> This estimate is based on the assumption that 72 percent of regulated contractor companies have greater than 100 employees and will likely use a web-based application system.

<sup>40</sup> OFCCP utilized the same ratio (approximately 3.7) of parent companies to number of establishments from the EEO-1 data to determine that among the universe of 251,300 establishments there are approximately 67,919 Federal contractor companies

take 1.5 hours to review and retrieve existing sample invitations to self-identify, adopt the sample “as is” or make revisions to their existing form, save the invitation to self-identify and incorporate the document in the contractor’s application form. The burden for these contractors would be 73,352 hours (48,901 contractor companies x 1.5 hours = 73,352 hours). The remaining contractors would simply have to incorporate the invitation to self-identify in paper applications. OFCCP estimates this will take approximately 30 minutes. The burden for these contractors would be 9,509 hours (19,017 contractor companies x 30 minutes/60 = 9,509 hours). The minimum cost for this provision would be approximately \$3,102,510.

If all contractors used a web-based application the one-time burden of preparing the form and making the IT changes for this provision is 101,879 hours (67,919 contractor companies x 90 minutes/60 = 101,879 hours). The maximum cost for this provision would be approximately \$3,814,616.

Applicants for available positions with covered Federal contractors will have a minimal burden complying with section 60-741.42(a) in the course of completing their application for employment with the contractor. Section 60-741.42(a), on pre-offer self-identification, requires contractors to invite all applicants to self-identify whether or not they are an individual with a disability. OFCCP estimates that there will be a minimum of 15 applicants per job vacancy for on average 15 vacancies per year. OFCCP further estimates that it will take applicants approximately 5 minutes to complete the form. The burden for this provision is 3,211,406 hours (171,275 contractor establishments x 15 listings x 15 applicants x 5 minutes/60 = 3,211,406 hours). The minimum costs for this provision is \$96,695,442. OFCCP estimates that there will be a maximum of

approximately 33 applicants per job vacancy for on average 15 vacancies per year per establishment. OFCCP further estimates that it will take applicants approximately 5 minutes to fill out the self-identification form. The burden for this provision is 7,065,093 hours ( $171,275 \text{ contractor establishments} \times 15 \text{ listings} \times 33 \text{ applicants} \times 5 \text{ minutes}/60 = 7,065,093 \text{ hours}$ ). The maximum costs for this provision would be \$212,729,213.

Assuming that 251,300 establishments are impacted by the final rule, the minimum burden for this provision would be 4,711,875 hours ( $251,300 \text{ contractor establishments} \times 15 \text{ listings} \times 15 \text{ applicants} \times 5 \text{ minutes}/60 = 4,711,875 \text{ hours}$ ). The minimum costs for this provision would be \$141,874,556. OFCCP estimates that there will be a maximum of approximately 33 applicants per job vacancy for on average 15 vacancies per year per establishment. OFCCP further estimates that it will take applicants approximately 5 minutes to fill out the self-identification form. The burden under this scenario would be 10,366,125 hours ( $251,300 \text{ contractor establishments} \times 15 \text{ listings} \times 15 \text{ applicants} \times 5 \text{ minutes}/60 = 10,366,125 \text{ hours}$ ). The costs would be \$312,124,024.

Commenters also expressed concern about the proposed requirement to anonymously survey all employees to provide an opportunity to voluntarily self-identify as an individual with a disability. Commenters were particularly concerned about the administrative costs related to this provision. A few commenters suggested that complying with this requirement would cost thousands of dollars. These commenters emphasized the costs related to conducting the survey, securely maintaining the data, or consulting with an outside entity to administer the survey. Several commenters noted that the information would lack any value because it would be highly unreliable.

The final rule, at § 60-741.42(c), requires contractors to invite each of their employees to self-identify as an individual with a disability during the first year it becomes subject to the requirements of this section, and at five year intervals, thereafter. At least once during the years between each invitation, contractors must remind their employees that they may voluntarily update their disability status at any time. As noted earlier, the invitation to self-identify is a critical component to allowing contractors, and subsequently OFCCP, to collect valuable, targeted data on the number of individuals with disabilities in the contractors' workforce. Furthermore, inviting self-identification on a periodic basis will enable contractors to capture employees who may become disabled after their hire date or may feel more comfortable self-identifying once he or she has been employed for some time. Contractors will incur the costs of the invitation essentially every other year.

In light of the various comments raised regarding the burden associated with this requirement, the final rule revises the burden estimate for this provision. The contractors' employees will be asked to self-identify utilizing the same "Voluntary Self-Identification of Disability" form provided by OFCCP to be used at the pre-offer and post-offer invitation. Therefore, the time needed by employees to review and complete the form for the voluntary self-identification should be nominal. The form will be simple, written plainly, and will provide employees the option of selecting between one of two identification options.

The employee invitation to self-identify does not require creating an entirely new database or methodology for capturing employee data. Nor does this requirement necessitate procuring an outside consultant to administer this invitation. Rather, OFCCP

envisions that this process will require a dedicated period of time during which contractors will enable existing employees to voluntarily self-identify as an individual with a disability using the same “Voluntary Self-Identification of Disability” form mentioned previously. Contractors can also track the data in the same manner that they use for other required invitations to self-identify.

However, OFCCP acknowledges that this process may take longer than the 5 minutes estimated by the NPRM. The final rule estimates that it will take contractors 1.5 hours to conduct the invitation to self-identify. This includes the time needed to develop communications regarding the invitation, distribute communications, and collect and track self-identification forms. OFCCP believes this process will become much more streamlined over time and will likely require significantly less than 1.5 hours in subsequent years. The estimated burden for this provision is 256,913 hours (171,275 contractor establishments x 90 minutes/60 = 256,913 hours). The approximate cost of this provision is \$9,619,542.

Assuming there are 251,300 establishments impacted by the final rule, the burden for this provision would be 376,950 hours (251,300 contractor establishments x 5 minutes/60 = 376,950 hours). The total cost of the provision would be \$14,114,063.

Contractor employees will have to spend some time reviewing and/or completing the survey. There are approximately 27,400,000 Federal contractor employees. OFCCP estimates that employees will take 5 minutes to complete the self-identification form. The burden for this provision is 2,283,333 hours (27,400,000 employees x 5 minutes/60 = 2,283,333 hours). Utilizing Bureau of Labor Statistics data in the publication “Employer Costs for Employee Compensation” (September 2011), which lists an average total

compensation for all civilian workers as \$30.11 per hour, the cost of this provision would be \$68,751,157.

OFCCP further estimates that it will take contractors 15 minutes to maintain self-identification forms. This time includes either manually storing the forms in a filing cabinet or saving them to an electronic database. The burden for this provision is 42,819 hours (171,275 contractor establishments x 15 minutes/60 = 42,819 hours). The approximate cost of this provision is \$1,603,263.

Assuming there are 251,300 establishments impacted by the final rule, the burden for this provision would be 62,825 hours (251,300 contractor establishments x 15 minutes/60 = 62,825 hours). The cost for this provision would be \$2,352,344.

5. Section 60-741.44 Required contents of the affirmative action program

Paragraph (a): Affirmative action policy statement

Section 60-741.44(a) of the final rule clarifies the contractor's duty to make the equal opportunity policy statement accessible to all employees. The final rule revises the parenthetical at the end of the sentence by replacing the outdated suggestion of "hav[ing] the notice read to a visually disabled person" as an accommodation with the suggestion to provide Braille, large print, or other versions that allow persons with disabilities to read the notices themselves. It also requires the policy statement to indicate the top United States executive, such as the Chief Executive Officer (CEO) or the President of the United States Division of a foreign company, who supports the contractor's affirmative action program. The NPRM estimated that it would take contractors 10 minutes to receive requests for accommodation, provide the document in an alternative format, and maintain records of compliance. Some commenters expressed concern that contractors

would have a significant burden making the affirmative action policy available in multiple formats to accommodate various disabilities.

Upon further consideration, OFCCP determines that there is no additional cost for this provision in the final rule. The nondiscrimination requirements of OFCCP's existing regulations require contractors to provide reasonable accommodation. See 41 CFR 60-741.21(f)(1). This modification simply updates the example of a possible accommodation that contractors may provide to a visually impaired person, and does not impose a new obligation on contractors. Similarly, no burden is associated with providing more specificity to the existing requirement that the contractor indicate the CEO's "attitude on the subject matter."

Paragraph (b): Review of personnel processes

Section 60-741.44(b) currently requires contractors to periodically review personnel processes to ensure that they do not screen out individuals with disabilities. The NPRM proposed requiring contractors to conduct this review annually and mandated specific steps contractors must take during the review, including: (1) identifying the vacancies and training programs for which protected applicants and employees were considered; (2) providing a statement of reasons explaining the circumstances for rejecting individuals with disabilities for vacancies and training programs and a description of considered accommodations; and (3) describing the nature and type of accommodations for individuals with disabilities who were selected for hire, promotion, or training programs. The NPRM did not assign burden for identifying vacancies and training programs since these provisions mirrored proposed requirements in OFCCP's VEVRAA NPRM, 76 FR 23358 (April 26, 2011). The NPRM estimated that it would



take contractors 30 minutes to provide a statement explaining the reasons for rejecting individuals with disabilities for vacancies and training programs. Finally, the NPRM estimated that it would take 30 minutes for contractors to describe accommodations for individuals with disabilities who were selected for hire, promotion, or training programs.

Several commenters noted that proposed § 60-741.44(b) would create a significant burden and costs on contractors. Commenters asserted that the proposed provision would require contractors to create documents related to thousands of employment transactions per year. Commenters also asserted that OFCCP's estimate of 30 minutes to develop these records was too low. Several commenters provided their own estimates that were significantly higher than those proposed by OFCCP. In response to these concerns, OFCCP does not adopt the proposal as drafted in the NPRM, and the final rule retains the existing language in § 60-741.44(b). Therefore, there is no new burden associated with this provision.

The NPRM also proposed requiring contractors to ensure that its use of information and communication technology is accessible to applicants and employees with disabilities. Some commenters objected to this provision, stating that it would be costly and time-consuming for contractors to ensure that all of its information and communication technology was fully accessible and up-to-date. The final rule clarifies the language in this section by stating that contractors must ensure that applicants and employees with disabilities have "equal access to its personnel processes, including those implemented through information and communication technologies." Further, contractors must provide "necessary reasonable accommodation to ensure applicants and employees with disabilities receive equal employment opportunity in the operation of

personnel processes.” Since contractors already have a duty to provide reasonable accommodations for individuals with disabilities, there is no new burden for this provision. See 41 CFR 60-741.21(f).

Paragraph (c): Physical and mental qualifications

The NPRM proposed requiring contractors to annually review all physical and mental job qualification standards and for contractors to document their annual review. The NPRM also proposed requiring the contractor to document those instances in which it believes that an individual would constitute a “direct threat” as understood under the ADA, as defined in these regulations, and to maintain the written statement as set forth in the recordkeeping requirement in § 60-741.80. The NPRM did not assign burden for the proposed provision since it mirrored requirements in section 60-300.44(c) of the VEVRAA proposed rule, 76 FR 23358 at 23417. Several commenters expressed concern with this provision. Commenters noted that annual review of all job qualifications and standards could cost some contractors thousands of dollars, especially larger contractors that may have thousands of job titles. Commenters recommended that OFCCP consider requiring the review less frequently. In order to minimize the burden, the final rule retains the existing language in 41 CFR 60-741.44 requiring periodic review of physical and mental job qualifications to ensure they do not screen out individuals with disabilities. Therefore, there is no new burden for this provision.

Paragraph (d): Reasonable accommodation to physical and mental limitations

The NPRM proposed requiring contractors to ensure that its electronic or online job application systems are compatible with assistive technology commonly used by individuals with disabilities, such as screen reading and speech recognition software.

OFCCP determined that this requirement is more appropriately addressed in § 60-741.21(a)(6)(iii) as a part of the fundamental reasonable accommodations obligations of contractors. The existing regulations make clear that it is “unlawful for [a] contractor to fail to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee.” 41 CFR 60-741.21(f). Further, the existing definition of “reasonable accommodation” includes “[m]odification or adjustments to a job application process that enable a qualified applicant with a disability to be considered for the position such applicant desires.” 41 CFR 60-741.2(v)(1)(i). Since Federal contractors have a duty to ensure that individuals with disabilities who require assistive technology are able to use their job application process, the proposed language does not create any new burden on contractors. The proposal simply clarifies how contractors can meet their existing obligations. Therefore, there is no new burden for this provision.

Paragraph (f): Outreach and recruitment efforts

The NPRM proposed several revisions to § 60-741.44(f). The NPRM proposed requiring contractors to list all of their employment opportunities, with limited exceptions, with the nearest Employment One-Stop Career Center. The NPRM did not estimate any burden for this provision since it mirrored an existing VEVRAA requirement. The proposed paragraph (f)(1)(ii) required contractors to enter into three linkage agreements with various entities to help recruit applicants with disabilities. The NPRM estimated that it would take contractors on average 3.2 hours to enter into these linkage agreements. The proposed paragraph (f)(1)(iv) required contractors to notify subcontractors, vendors, and suppliers of the company’s affirmative action policies. The NPRM estimated that it would take contractors 5 minutes to revise notices created under

a similar proposed requirement in the VEVRAA NPRM to include references to the company's nondiscrimination and affirmative action policies for individuals with disabilities. The proposed paragraph (f)(3) required contractors to conduct self-assessments of their outreach and recruitment efforts. The NPRM estimated that it would take contractors 30 minutes to conduct an assessment of outreach and recruitment in conjunction with correlating assessments under EO 11246 and VEVRAA. Finally, the proposed paragraph (f)(4) clarified the contractor's recordkeeping obligations with regard to these outreach and recruitment efforts.

Several commenters expressed concern regarding the potential burden of the proposed revisions to § 60-741.44(f). Commenters noted that submitting job listings to Employment One-Stop Career Centers in the manner and format required by the center would require a significant expenditure of time. Commenters further noted that it would take much longer than OFCCP estimated to develop meaningful relationships with recruitment entities through linkage agreements. Further, some larger contractors with multiple establishments could be required to enter into hundreds of different linkage agreements. Commenters stated that a less burdensome approach would be for OFCCP to create a job bank that would enable Federal contractors to centrally post all of their job listings to promote recruitment of individuals with disabilities. Other commenters objected to the burden created by the five-year recordkeeping requirements. In response to these concerns, the final rule eliminates the proposed requirements to list all job opportunities with the nearest Employment One-Stop Career Center and enter into linkage agreements. The final rule retains the existing language of § 60-741.44(f), which requires that the contractor undertake "appropriate outreach and positive recruitment

activities,” and provides a number of suggested resources that contractors may utilize to carry out this general recruitment obligations. Therefore, there is no new burden for these provisions.

The final rule adopts the requirement for contractors to send written notification to subcontractors, vendors, and suppliers of the company’s affirmative action policy. Section 60-300.44(f)(1)(ii) of the VEVRAA final rule also requires contractors to send written notification of the company policy related to its affirmative action efforts to all subcontractors, including subcontracting vendors and suppliers. OFCCP therefore expects that contractors will send a single, combined notice, informing subcontractors, vendors and suppliers of their VEVRAA and section 503 policies. Accordingly, OFCCP determined that there is no additional burden for this provision.

Paragraph (f)(3) of the NPRM required contractors to annually review their outreach and recruitment efforts to determine whether they were effective and document its review. Several commenters stated that this requirement would be unduly burdensome and would result in little benefit to contractors’ affirmative action efforts. Commenters also stated that OFCCP’s estimate of the time required for the review was too low. Commenters offered their own estimates that were significantly higher than that proposed by OFCCP.

Section 60-741.44(f)(3) of the final rule adopts this requirement as proposed. OFCCP expects that contractors will conduct this assessment in conjunction with the correlating assessments required under EO 11246 and VEVRAA. Further, OFCCP believes that if a contractor has been complying with its recruitment, outreach, data collection, and recordkeeping responsibilities throughout the affirmative action program

year, as well as its general obligation under § 60-741.40(c) to review and update its affirmative action program on an annual basis (which includes its outreach and recruitment efforts, see § 60-741.44(f)), it will take an average of 30 additional minutes for the contractor to conduct the specific effectiveness assessment of its outreach and recruitment efforts, which would include a simple comparison of the annual raw data on applicants and hires that contractors collect pursuant to §60-741.44(k) to previous years' data, as well as their hiring benchmark, and determining in light of these numbers and any other relevant circumstances whether adjustments in their outreach efforts is necessary. OFCCP estimates that 1 percent of contractors are first-time contractors during an abbreviated affirmative action program year and will be unable to complete the review. The recurring burden for this provision is 84,781 hours (169,562 contractor establishments x 30 minutes/60 = 84,781 hours). The estimated cost for this provision is \$3,174,438.

Assuming that 251,300 establishments would be impacted by the final rule, the burden for this provision would be 124,394 hours (248,787 contractor establishments x 30 minutes/60 = 124,394 hours). The cost for this provision would be \$4,657,641.

Section 60-741.44(f)(4) of the final rule requires contractors to document all the outreach and recruitment activities they undertake to comply with § 60-741.44(f) and retain these documents for a period of 3 years. Under the existing regulations, contractors are required to establish meaningful outreach and recruitment contacts. Consequently, contractors' outreach and recruitment should already be the subject of some documentation. This documentation may take several forms. It may include, for example, the numbers and types of outreach and recruitment events, the targeted groups

or types of participants for each event, the dates or timeframes, location of the events, and who conducted and participated in the outreach and recruitment on behalf of the contractor.

OFCCP estimates that it will take contractors 10 minutes to maintain the outreach and recruitment documentation that would typically be generated as a result of their obligations pursuant to other provisions in the regulations. This does not include any additional time to make the software configuration needed to tell the contractor's computer system to store data for an additional year, as this burden was previously accounted for in the VEVRAA final rule's burden analysis of § 60-300.80(b). Therefore, the recurring burden for this provision is 28,546 hours (171,275 contractor establishments x 10 minutes/60 = 28,546 hours). The approximate cost for this provision is \$1,068,842. Assuming there are 251,300 contractor establishments impacted by the final rule, the burden for this provision would be 41,833 hours (251,300 contractor establishments x 10 minutes/60 = 41,833 hours). The cost for this provision would be \$1,568,229.

Paragraph (g): Internal dissemination of affirmative action policy

The NPRM proposed requiring the contractor to take several specific actions to disseminate its affirmative action policy, including incorporating the affirmative action policy in company policy manuals, informing all applicants and employees of the contractor's affirmative action obligations, and conducting meetings with management and company leadership to ensure they are informed about the contractor's obligations. The NPRM also proposed requiring contractors to hold meetings with employees at least once a year to discuss the section 503 affirmative action policy. The NPRM estimated that contractors would have a one-time burden of 20 minutes to develop the employee

orientation presentation on the company's affirmative action requirements and an additional burden of 5 minutes to conduct the presentation. The NPRM further estimated that it would take contractors 30 minutes to disseminate the equal employment policy to any entity that the contractor has a collective bargaining agreement with and 5 minutes to maintain records of compliance with § 60-741.44(g).

OFCCP received several comments asserting that the agency underestimated the amount of time it would take to comply with the provision. One commenter provided its own estimates from an internal survey of companies that estimated compliance times ranging from 5 to 20 hours. The commenter further asserted that OFCCP failed to consider the number of meetings required or coordination with the internal communications and web services to disseminate the policy. Finally, commenters stated that OFCCP underestimated the costs of this provision by failing to account for the cost of staff time to attend the meetings. In response to these concerns, the final rule does not incorporate the requirement to have contractors conduct meetings with management and all other employees at least once a year to discuss the section 503 affirmative action policy.

The final rule adopts the requirement to include the affirmative action policy in the contractor's policy manual or otherwise make it available to its employees. The existing regulations currently require contractors to develop some internal procedure to communicate to employees its affirmative action obligation to employ and advance in employment individuals with disabilities. See 41 CFR 60-741.44(g)(1). The final rule simply clarifies that one of the means by which contractors can do that is by including this in the policy manual. The final rule also gives contractors the flexibility to



disseminate the policy by another means, which can include the method they are currently using to comply with the law. Therefore, there is no new burden related to this provision.

The remaining elements that were required in the NPRM and/or were suggested in the existing rule remain in paragraph (g)(3) of the final rule as actions that the contractor is suggested to take, with the exception of the recordkeeping provision, which has been eliminated.

#### Section 60-741.44(h) Audit and Reporting System

Section 60-741.44(h)(1)(vi) of the final rule requires contractors to document the actions taken to comply with the obligations of paragraphs (h)(1)(i) through (v) of this section, and retain these documents as employment records subject to the recordkeeping requirements of § 60-741.80. Seven commenters stated that the proposed requirement would impose a burden and require new processes for tracking and recordkeeping.

This section is adopted in the final rule as proposed. Under the existing rule, most contractors should document and maintain their analysis of the affirmative action program as a normal part of their review and assessment process. Compliance officers report that, on request, they review or are provided a range of documents related to the analysis including, for example, reports, summaries and data. In many regards, this provision merely acknowledges and formalizes a current contractor practice. OFCCP estimates that it will take contractors 10 minutes to document the actions taken to comply with § 60-741.44(h) and retain those documents. The recurring burden for this provision is 28,546 hours ( $171,275 \text{ contractor establishments} \times 10 \text{ minutes} = 856,375/60 = 28,546$  hours). The estimated cost of this provision is \$1,068,842. Assuming there are 251,300

establishments impacted by the final rule, the burden for this provision would be 41,833 hours (251,300 contractor establishments x 10 minutes/60 = 41,833 hours). The cost for this provision would be \$1,568,229.

Paragraph (i): Responsibility for implementation

The NPRM proposed requiring contractors to identify the official responsible for affirmative action activities on all internal and external communications regarding the contractor's affirmative action program. In the current regulation, this disclosure is only suggested. Upon further review, OFCCP does not believe that the benefit of this suggested change outweighs the potential burden that it would place on contractors. Accordingly, the language in the existing regulation that contractors should, but are not required to, take this step is retained. Therefore, there is no new burden for this provision.

Paragraph (j): Training

Section 60-741.44(j) of the existing regulation requires training for all personnel involved in recruitment, hiring and promotion decisions to ensure that the contractor's affirmative action program is implemented. The NPRM proposed revising this paragraph to outline specific topics that must be covered in the training. The NPRM also proposed requiring contractors to make specific records and maintain these records, along with all written or electronic training materials used. Since this provision mirrored a similar proposed requirement in the VEVRAA NPRM, the section 503 NPRM estimated that it would take contractors 40 minutes to develop the section 503 aspects of the training and 20 minutes to present it.

Several commenters raised concerns regarding the burden that the training requirements would place on contractors. Commenters noted it would take hours to create their own training modules to adequately cover all of the information required by the proposed rule. Commenters suggested that OFCCP provide a training module to alleviate the burden of this provision to contractors. Commenters further noted that OFCCP did not adequately assess the cost of the provision since the NPRM did not include the cost of staff time to participate in the trainings.

In consideration of these comments, the final rule does not incorporate the portion of the proposed rule listing specific training items that must be covered by contractors or the specific recordkeeping requirement. Accordingly, no new burden is created by this provision in the final rule.

#### Paragraph (k): Data Collection Analysis

The NPRM proposed requiring contractors to make several quantitative measurements and comparisons regarding referrals, applicants and hires with disabilities and job fill ratios. The NPRM estimated that it would take contractors 1 hour to conduct the required data analysis.

Several commenters expressed concern about the burden associated with this proposal. Commenters were particularly concerned about the requirement to track and analyze referral data since applicants often do not indicate whether they were referred by a state employment service delivery system on their applications. Commenters further asserted that the newly required data collection and analysis would require expensive modifications to existing HRIS. Some commenters noted that the requirement would place a substantial burden on small businesses or contractors that do not have

sophisticated electronic databases. One commenter noted that some contractors would be required to manually search paper records and compile data using pencil and paper. Commenters that were opposed to this requirement further noted that the results of the analysis would be questionable in light of the concerns regarding reliability of self-identification data.

The final rule adopts the requirement to collect and maintain data regarding applicants and hires with disabilities. The final rule eliminates the requirement for contractors to collect, maintain and analyze referral data on individuals with disabilities. The final rule also does not require contractors to calculate applicant, hiring, and job fill ratios in this provision. This eliminates many of the concerns commenters raised regarding this paragraph, and also serves to significantly decrease the burden on contractors. OFCCP also included a substantial initial capital or start-up cost estimate for contractors to put systems in place to efficiently track the data.

OFCCP disagrees with the assertion that a significant number of establishments would have to complete this analysis using paper and pencil. Feedback received from public comments regarding the concerns over costs for modifying human resources information systems further indicate that most contractors will have the capability to conduct the required calculations electronically. There are spreadsheet databases that are commonly used by businesses and have the capability to complete the kind of analysis required by § 60-741.44(k) in a manner of minutes. Contractors using this basic kind of tracking database may need to spend some time entering data by hand. However, the amount of time spent should be minimal, as this section only requires the calculation of a few workforce-wide comparisons regarding applicants and hires with disabilities.

Further, OFCCP clarifies the only “new” items in this section are those pertaining to the self-identification applicant and hiring data. The burden for collecting and maintaining the applicant data is already partially calculated under § 60-741.42(a); the burden associated with this section is largely just totaling the raw data on applicants.

OFCCP estimates that it will, at a minimum, take contractors 25 minutes to tabulate the applicant data using an electronic database that is integrated with the contractors’ human resources information database where the data is typically stored. In addition, we estimate that an additional 10 minutes is required to electronically or otherwise store the records (e.g., the report or other written documentation generated by the calculations that explain the methodology, the data used, and the findings and conclusions; the data used to conduct the calculations for subsequent validation of the results; and other material used by the contractor for the calculations). The recurring burden for this provision is 99,910 hours (171,275 contractor establishments x 35 minutes/60 = 99,910 hours). The minimum cost for this provision is approximately \$3,740,926.

However, some commenters noted that companies may have to calculate this information manually. Commenters stated that these calculations could take more than 6 hours. OFCCP declines to adopt the 6 hour estimate for manual calculations in large part because the estimate and the requirements of this section are significantly scaled back from the proposed rule, as the final rule does not require contractors to tabulate referral data. Accordingly, starting with the 6 hour estimate and scaling it back given the reduced burden of the final rule, OFCCP estimates that establishments without web-based application systems would take approximately 3 hours to tabulate the information

required by this section. The burden for these establishments would be 102,765 hours (34,255 contractor establishments x 3 hours= 102,765 hours). The remaining establishments would incur the 35 minute burden, for a total of 79,928 hours (137,020 establishments x 35 minutes/60 = 79,928 hours). The maximum cost for this provision is approximately \$6,840,550.

Assuming there are 251,300 contractor establishments impacted by the final rule, OFCCP estimates that it will, at a minimum, take contractors 25 minutes to tabulate the applicant data using an electronic database and an additional 10 minutes to electronically or otherwise store the records (e.g., the report or other written documentation generated by the calculations that explain the methodology, the data used, and the findings and conclusions; the data used to conduct the calculations for subsequent validation of the results; and other material used by the contractor for the calculations). The recurring burden for this provision would be 146,592 hours (251,300 contractor establishments x 35 minutes/60 = 146,592 hours). The minimum cost for this provision would be approximately \$5,488,802.

The NPRM also proposed requiring contractors to maintain that data for 5 years. In response to the comments, the final rule reduces the record retention requirement for § 60-741.44(k) to 3 years. No new software needs are anticipated, however, a software switch or configuration may be required to tell the system to retain the records for the additional 1 year (or an additional 2 years in the case of a smaller contract or contractor). According to an IT professional, this is a simple configuration and should take about 15 minutes to execute. No new burden is added because the change required by the recordkeeping provisions of §§ 60-741.44(f)(4) of this final rule and 60-300.(80)(b) of

the VEVRAA final rule include this IT change.

OFCCP also solicited comments regarding adding a reporting requirement that would contain the measurements and computations required by proposed paragraph (k), and including the percentage of applicants, new hires, and total workforce for each EEO-1 category. The majority of comments on this proposal asserted that the requirement would impose an unnecessary burden. Several commenters stated that OFCCP did not provide any support or justification for proposing the requirement. As noted in the Section-by-Section analysis, OFCCP weighed the utility of this reporting requirement and found that it may create unnecessary burden. Therefore, the final rule does not adopt the proposed reporting requirement.

6. Section 60-741.45 Utilization Goal

The NPRM proposed a new § 60-741.46 that would establish a single, national utilization goal for individual with disabilities. The proposed § 60-741.46 also outlined steps contractors must take to determine whether they have met the utilization goal and develop and execute “action-oriented programs” to correct any identified problems related to attaining the goal. Finally, the NPRM sought comment on whether there should be a sub-goal for individuals with targeted disabilities. The NPRM estimated that it would take 5 minutes of recordkeeping time per contractor to document the goal. The NPRM further estimated that it would take contractors 1 hour in the first year to determine whether the company has met the goal.

Several commenters stated that establishing a utilization goal for individuals with disabilities would be extremely burdensome. Commenters noted that the proposed provision would require a substantial amount of staff time to research and collect the data

for the utilization analysis. One commenter noted that the utilization goal would be particularly onerous for larger contractors as the requirement could result in creating thousands of new goals. The burden would be doubled if contractors had to establish a sub-goal.

The final rule adopts the proposed utilization goal of 7 percent, now § 60-741.45 of the final rule. As noted in the preamble, the long-term, employment disparities between individuals with and without a disability necessitate a quantifiable means by which to assess whether contractors are achieving equal employment opportunity. Further, OFCCP received significant support for the goal from commenters. The disability community and those representing their interests, in particular, were strongly in support of this new requirement. For these commenters, affirmative action efforts under section 503 have been largely meaningless without, among other things, measurable goals for the employment of people with disabilities.

OFCCP disagrees with the assertion that this provision would require contractors to create thousands of new goals. The final rule establishes one goal that applies to all contractors and all different job groups. Section 60-741.45 creates no obligation for contractors to independently create goals specific to their organization or any particular job group. Contractors will use the standard 7 percent goal when conducting their utilization analysis.

Individuals with disabilities make up 4.83 percent of the employed.<sup>41</sup> The section 503 rule establishes a utilization goal for employing individuals with disabilities of 7

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<sup>41</sup> U.S. Census Bureau, 2011 American Community Survey. There are a variety of sources for this estimate. The Current Population Survey estimates a lower rate, 3.5 percent, and the Survey of Income and Program Participation estimates 9.4 percent.



percent. To meet the goal, OFCCP estimates that Federal contractors would hire an additional 594,580 individuals with disabilities. This amounts to an additional 2.37 employees per establishment or 8.75 employees per company.<sup>42</sup> Some of these new hires may require a reasonable accommodation. According to research conducted by the Job Accommodation Network (JAN), employers in the study reported that 57 percent of accommodations cost absolutely nothing. For the remaining 43 percent, the typical cost of providing a reasonable accommodation was approximately \$500.<sup>43</sup> Few employers, about 4 percent, reported incurring ongoing annual costs associated with providing accommodations. We estimate, in light of this information, that 219,338 disabled non-protected veterans may need accommodations with a total cost of \$114,770,291 in the year the target is met and \$48,524,879 in recurring costs.

A few commenters stated that one hour is not a sufficient amount of time to conduct the required utilization analysis. OFCCP also disagrees with this assertion. As noted earlier, supply and service contractors are already required to conduct a utilization analysis. See 41 CFR 60-2.15(a). These contractors should have some mechanisms in place to conduct this analysis efficiently. Furthermore, OFCCP has estimated a substantial amount of initial capital and start-up costs for contractors to put procedures in place for the annual analysis to be conducted efficiently. OFCCP also increased the estimate of the amount of time necessary to conduct the self-identification process, which will inform the utilization analysis. Therefore, the final rule estimates that, at a

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<sup>42</sup> This assumes that there are 251,300 contractor establishments and 67,919 companies. Under an alternative scenario of 171,275 establishments and 46,291 companies, the additional number of disabled hires per establishment and company is 3.52 and 13.02, respectively.

<sup>43</sup> Job Accommodation Network, "Workplace Accommodations: Low Cost, High Impact," Sept. 1, 2012. Accommodation and Compliance Series, <http://askjan.org/media/lowcosthighimpact.html> (last accessed Aug. 9, 2013).

minimum, contractors will take 1 hour to conduct the utilization analysis. The burden for this provision is 171,275 hours (171,275 contractor establishments x 1 hour = 171,275 hours). The minimum costs for this provision is \$6,413,015.

However, some commenters noted that companies may have to calculate this information manually. Utilizing data from the EEO-1 regarding the number of establishments with fewer than 100 employees, OFCCP estimates that 20 percent of establishments may have to conduct the analysis manually. These establishments would take approximately 3 hours to tabulate the information required by this section. The burden for these establishments would be 102,765 hours (34,255 contractor establishments x 3 hours= 102,765). The remaining establishments would incur the 1 hour burden, for a total of 137,020 hours (137,020 contractor establishments x 1 hour = 137,020 hours). The maximum cost for this provision is approximately \$8,978,223.

Assuming there are 251,300 contractor establishments impacted by the final rule and they all utilized some form of electronic system to conduct the analysis, the burden for this provision would be 251,300 hours (251,300 contractor establishments x 1 hour = 251,300 hours). The cost for this provision would be \$9,409,376. OFCCP estimates that 20 percent of these establishments may have to conduct the analysis manually. These establishments would take approximately 3 hours to tabulate the information required by this section. The burden would be 150,780 hours (50,260 contractor establishments x 3 hours= 150,780 hours). The remaining establishments would incur the 1 hour burden, for a total of 201,040 hours (201,040 establishments x 1 hour = 201,040 hours). The maximum cost for this provision would be approximately \$13,173,126.

OFCCP further estimates that it will take contractors an additional 10 minutes to maintain records of the utilization analysis. This simply requires filing away any records created while conducting the analysis. The recordkeeping burden is 28,546 hours (171,275 contractor establishments x 10 minutes/60 = 28,546 hours). The total cost for this provision is \$1,068,836.

Assuming there are 251,300 establishments impacted by the final rule, the burden for this provision would be 41,833 hours (251,300 contractor establishments x 10 minutes/60 = 41,833 hours). The cost for this provision would be \$1,568,229. Section 60-741.45(e) requires contractors to make an assessment of whether any impediments to equal employment opportunity for individuals with disabilities exist. This assessment can be based on reviews currently required under §§ 60-741.44(b) (review of personnel processes), 60-741.44(f) (review of outreach and recruitment efforts), and 60-741.44(h) (audit of the affirmative action program). A new paragraph (f) entitled “Action-oriented programs” requires contractors to develop action-oriented programs when problem areas have been identified by the utilization analysis. These action-oriented programs may include the modification of personnel processes, alternative or additional outreach and recruitment efforts, and/or other actions designed to correct the identified problem areas and attain the established goal. The existing regulations require contractors to measure the effectiveness of the affirmative action program and correct any identified deficiencies. See 41 CFR 60-741.44(h). Therefore, there is no new burden created by paragraphs (f) or (e).

#### 7. Section 60-741.60 Compliance evaluations

Section 60-741.60 of the final rule allows OFCCP to request that contractors

make documents available on or off-site during a compliance evaluation and establishes new procedures for pre-award compliance evaluations under section 503. Since contractors are currently required to make documents available to OFCCP during a compliance evaluation, there is no additional cost for allowing OFCCP off-site access to documents. This provision simply affords OFCCP the opportunity to conduct reviews of relevant materials at any appropriate location. The newly created pre-award compliance evaluation requires no action by the contractor and only places a burden on the Federal contracting agency and OFCCP.

#### 8. Section 60-741.80 Recordkeeping

The NPRM proposed requiring contractors to maintain records created pursuant to the proposed §§ 60-741.44(f)(4) and 60-741.44(k) for five years. Commenters stated this requirement was overly burdensome as contractors would be required to maintain a substantial amount of new records either physically or electronically for a longer period of time than required by the existing regulations.

Section 60-741.80 of the final rule requires contractors to maintain data pursuant to §§ 60-741.741(f)(4) (outreach and recruiting efforts) and 60-741.44(k) (applicant and hire data) for 3 years. OFCCP disagrees with the assertion that this requirement would create a need to secure substantial electronic or physical storage space to keep these records. For example, compliance with § 60-741.44(f)(4) can include material evidence that the contractor has attended recruiting events or other similar activities. Since contractors no longer need to maintain referral records, the recordkeeping burden of § 60-741.44(k) requirement is substantially reduced. The primary record contractors would have to maintain is the self-identification forms that the data analysis is based on. As

such, there should be no need to secure substantial new storage space beyond what the contractor already maintains in its normal course of business to maintain these forms. There is no additional burden assessed here because it is included in the estimates for §§ 60-741.44(f)(4) and 60-741.44(k). In those sections, we determined that no new software needs are anticipated, however, a software switch or configuration may be required to instruct the system to retain the records for the additional 1 year (or an additional 2 years in the case of a smaller contract or contractor).

9. Section 60-741.81 Access to records

Section 60-741.81 of the final rule requires contractors to specify all available records formats and allow OFCCP to select preferred record formats from those identified by the contractor during a compliance evaluation. Upon request, the contractor must provide OFCCP information about all format(s), including specific electronic formats, in which the contractor maintains its records and other information.

A few commenters objected to the requirement to provide records in formats OFCCP selects. The final rule clarifies this provision to make clear that contractors will not be required to invest time or resources creating records in a specific format, or creating a documented “list” of the formats in which they have documents available. Rather, contractors merely need to inform OFCCP of the formats in which they maintain records and other information, and allow OFCCP to select the format(s) in which the records or other information will be provided.

10. Appendix A, Guidelines on a Contractor’s Duty to Provide Reasonable Accommodation

Appendix A includes several changes that reflect updated terminology and

revisions made elsewhere in the regulations. These revisions create no new costs for contractors, therefore, there is no burden for Appendix A.

#### 11. Appendix B – Developing Reasonable Accommodation Procedures

The NPRM proposed a new provision at § 60-741.45 that would require contractors to establish formal, written reasonable accommodation procedures. The proposed provision required including various elements in the reasonable accommodation procedures; disseminating the procedures to all employees; informing applicants of the reasonable accommodation procedures; training for all managers on the procedures; and documenting specific information regarding reasonable accommodation requests. The NPRM estimated the following related to this provision: 30 minutes to develop the reasonable accommodation procedures; 5 minutes for first-time contractors to designate a responsible official for implementing the procedures; 15 minutes to disseminate the procedures to employees; 2 hours to develop the training on the procedures; and an additional 5 minutes to maintain records of compliance with the provision.

Several commenters stated that the proposed § 60-741.45 was an overly burdensome requirement. Commenters expressed particular concern about the burden of providing written confirmation of reasonable accommodation requests and explanations of any denials of reasonable accommodation. Some commenters noted that the burden of this requirement would be enormous, such that it was difficult to even quantify how much time it would take to comply with this provision.

Upon further review, OFCCP does not believe that the benefit of this suggested change outweighs the potential burden that it would place on contractors. Therefore, the final rule creates a new Appendix B entitled Developing Reasonable Accommodation

Procedures that provides specific guidance and sets forth recommended elements similar to those proposed in the NPRM that contractors may use when voluntarily establishing written reasonable accommodation procedures. The final rule also adds a new paragraph (vi) to § 60-741.21(a)(6) that acknowledges that the development and use of written reasonable accommodation procedures is a best practice. However, it does not require that contractors develop such procedures. Therefore, no new burden is assessed for this provision.

12.

#### Initial Capital or Start-up Costs

#### Human Resources Information Systems Modifications

Several commenters noted that the new data collection requirements in the proposed rule would require modifications to existing HRIS. In order to estimate the start-up costs for the final rule, OFCCP considered what would be required to modify existing HRIS to track the number of applicants and hires that self-identify as an individual with a disability. Because contractors must already maintain information on their employees by race/ethnicity and sex, contractors should have some mechanism in place to track the newly required information. Further, the VEVRAA final rule requires contractors to make similar revisions to their HRIS to accommodate the new VEVRAA data collection requirements. OFCCP reasonably anticipates that contractors will make the HRIS changes necessitated by this final rule in conjunction with the analogous changes needed to comply with the VEVRAA final rule, resulting in increased efficiency and reduced burden.

The minimum costs for modifying HRIS is based on the estimate that 72 percent

of contractors utilize this kind of electronic system.<sup>44</sup> Based on information from IT professionals, OFCCP estimates it would take each contractor company on average 18 hours to make the needed systems modifications to track applicant and hiring information for individuals with disabilities. This includes IT and administrative professionals to make the changes. The estimated costs for these modifications are based on data from the Bureau of Labor Statistics in the publication “Employer Costs for Employee Compensation” (September 2011), which lists total compensation for a professional of \$47.21 per hour. Therefore, the minimum estimated burden for the capital and start-up costs is 599,706 hours (33,317 contractor companies x 18 hours = 599,706 hours). We calculate the total minimum estimated start-up costs as \$28,312,120 (599,706 x \$47.21/hour = \$28,312,120) or \$849 per establishment. Assuming all contractor companies utilize HRIS, the maximum estimated burden for modifying the systems is 827,928 hours (45,996 contractor companies x 18 hours = 827,928 hours). We calculate the total costs as \$39,086,480 (827,928 hours x \$47.21/hour = \$39,086,480).

Assuming there are 251,300 contractor establishments in OFCCP’s jurisdiction, or 67,919 companies, the minimum estimated burden for the capital and start-up costs would be 880,218 hours (48,901 contractor companies x 20 hours = 880,218 hours). The total minimum estimated start-up costs would be \$41,555,092 (978,020 hours x \$47.21/hour = \$41,555,092) or \$849 per parent company. Assuming all contractor companies utilize HRIS, the maximum burden would be 1,222,542 hours (67,919 contractor companies x 18 hours = 1,222,542 hours). We calculate the total maximum estimated start-up costs as \$57,716,208 (1,358,380 hours x \$47.21/hour = \$57,716,208)

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<sup>44</sup> Utilizing EEO-1 data, OFCCP estimates that 72 percent of regulated contractor companies have greater than 100 employees and will likely use an electronic human resources system.



or \$849 per parent company.

#### Operations and Maintenance Costs

OFCCP estimates that the contractor will have some operations and maintenance costs in addition to the burden calculated above.

#### Section 60-741.42 Invitation to Self Identify

OFCCP estimates that the contractor will have some operations and maintenance cost associated with the invitations to self-identify. The contractor must invite all applicants to self-identify at both the pre-offer and post-offer stage of the employment process. Given the increasingly widespread use of electronic applications, any contractor that uses such applications to invite self-identification would not incur copy costs.

However, to account for contractors who may still choose to use paper applications, we are including printing and/or copying costs. The final rule reduces the numbers of forms to one to make the self-identification process less paperwork intensive and to reduce costs. We also estimate an average copying cost of \$.08 per page. Assuming contractors using a paper-based application system, used 15 applications for an average of 15 listings per establishment, the minimum estimated total cost to contractors will be \$616,590 ( $34,255 \text{ contractor establishments} \times 225 \text{ copies} \times \$0.08 = \$616,590$ ). Assuming contractors using a paper-based application system, used 33 applications for an average of 15 listings per establishment, the maximum estimated cost to contractors will be \$1,356,498 ( $34,255 \text{ contractor establishments} \times 30 \times \$0.08 = \$1,356,498$ ).

Assuming that 50,260 of 251,300 contractor establishments with a paper-based application system, used 15 applications for an average of 15 listings per establishment, the minimum estimated total cost to contractors will be \$904,680 ( $50,260 \text{ contractor}$

establishments x 225 copies x \$.08 = \$904,680). Assuming contractors using a paper-based application system, used 33 applications for an average of 15 listings per establishment, the maximum estimated cost to contractors will be \$1,990,296 (50,260 contractor establishments x 495 copies x \$.08 = \$1,990,296).

#### **D. Summary of Benefits**

As a result of this Final Rule, it is estimated that 594,580 individuals with disabilities could be hired in the first year alone.<sup>45</sup> There are tangible and intangible benefits from investing in the recruitment and hiring of individuals with disabilities. Among them are employer tax credits, access to a broader talent pool, an expanded pool of job applicants, access to new markets by developing a workforce that mirrors the general customer base, lower turnover based on increased employee loyalty, and lower training costs resulting from lower staff turnover.<sup>46</sup> According to the U.S. Business Leadership Network (USBLN), “corporate CEOs understand that it’s cost effective to recruit and retain the best talent regardless of disability.”<sup>47</sup> Broad public policy considerations also exist related to the decreased demand for and cost of social services as more people move into jobs and pay taxes.

#### **E. Conclusion**

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<sup>45</sup> Individuals with disabilities make up 4.83 percent of the employed. The estimate is based on calculating the number of hires needed to reach the 7% goal in the first year, the estimated number of employees working for covered Federal contractors, and the number of contractor establishments covered by OFCCP jurisdiction. To reach the goal, 594,580 additional individuals with disabilities would be hired. This number also assumes that contractors will not exceed the goal.

<sup>46</sup> Job Accommodation Network, “Workplace Accommodations: Low Cost, High Impact,” Sept. 1, 2012. Accommodation and Compliance Series, <http://askjan.org/media/lowcosthighimpact.html> (last accessed Aug. 9, 2013).

<sup>47</sup> USBLN Disability at Work, and U.S. Chamber of Commerce, “Leading Practices on Disability Inclusion,” [http://www.usbln.org/pdf-docs/Leading\\_Practices\\_on\\_Disability\\_Inclusion.pdf](http://www.usbln.org/pdf-docs/Leading_Practices_on_Disability_Inclusion.pdf) (last accessed Aug. 9, 2013). The USBLN and Chamber report shares best practices from larger corporations for hiring and providing reasonable accommodations.

OFCCP concludes in the final regulatory impact analysis that the costs of the final rule will range and likely exceed \$100 million annually. The variations in costs depend on the number of establishments impacted by the final rule. Costs will also vary by company depending on their existing infrastructure. We estimate that the lower end costs would be \$349,510,926 assuming that there are approximately 171,275 contractor establishments impacted by the final rule. The lower end estimate also relies on the assumption that many of these establishments have some form of electronic application and human resources information systems that would make complying with the rules requirements more efficient. The higher end estimate of \$659,877,833 assumes that there are 251,300 establishments impacted by the final rule. The higher end further assumes that a portion of those contractors, primarily smaller ones with fewer employees, would have to expend more personnel time complying with the rules requirements. The recurring costs in years contractors do not invite all employees to identify as an individual with a disability will range from \$162,371,816 to \$395,258,387. The recurring costs in year contractors do invite all employees to identify as an individual with a disability will range from \$242,345,778 to \$480,476,442. Therefore, the rule will have a significant economic impact. However, OFCCP believes that the final rule will have extensive benefits for individuals with disabilities who are prospective and current employees of Federal contractors and Federal subcontractors. As such, OFCCP concludes that the benefits of the rule justify the costs.

#### **Regulatory Flexibility Act and Executive Order 13272 (Consideration of Small Entities)**

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 et seq., requires agencies promulgating rules to consider the impact they are likely to have on small

entities. More specifically, the RFA requires agencies to “review rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations.” If a rule is expected to have a “significant economic impact on a substantial number of small entities,” the agency must prepare an initial regulatory flexibility analysis (IRFA). If, however, a rule is not expected to have a significant economic impact on a substantial number of small entities, the agency may so certify, and need not perform an IRFA.

Based on the analysis below, in which OFCCP has estimated the impact on small entities that are covered contractors of complying with the requirements contained in this rule, OFCCP certifies that this rule will not have a significant economic impact on a substantial number of small entities.

In making this certification, OFCCP first determined the approximate number of small regulated entities that would be subject to the rule. OFCCP’s review of the FY 2009 EEO-1 data revealed that the final rule directly impacts 20,490 Federal contractors with between 50 and 500 employees.<sup>48</sup> OFCCP analyzed the number of small entities impacted by the rule as compared to the agency’s entire universe of regulated entities of approximately 45,996 Federal contractors.<sup>49</sup> OFCCP estimates that approximately 44 percent of the total number of Federal contractors, or 20,490, are small entities with between 50 and 500 employees. OFCCP further refined the analysis to compare the

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<sup>48</sup> The Small Business Administration (SBA) Office of Advocacy reports that there are 27.4 million small entities in the United States. Since Federal contracts are not limited to specific industries, OFCCP assessed the impact of this final rule on small entities overall. If OFCCP used this approach, the final rule will impact less than .07% of non-employer firms and .34% of employer firms nationwide.

<sup>49</sup> The EEO-1 data base separately identifies contractor entities (companies) and the facilities that comprise them. The FPDS –NG data base, by contrast, identifies contractor facilities, but does not identify the larger entities of which they are a part. OFCCP utilized the ratio (approximately 3.7) of parent companies to number of establishments from the EEO-1 data to determine that among the universe of 171,275 contractor establishments there are approximately 45,996 Federal contractor companies.

impacted small entities to just the universe of 21,541 small entities in OFCCP's jurisdiction. Under this scenario, approximately 95 percent of small entities would be impacted by the requirements of the rule. Utilizing these comparisons, the final rule may have an impact on a substantial number of small entities.

OFCCP has determined, though, that the impact on entities affected by the final rule would not be significant. In order to further inform our analysis of the economic impact of this rule on small entities, we considered the cost impact of the rule on 2 sizes of entities. We estimated the compliance costs of the final rule on Federal contractors with 50 to 100 employees and 100 to 500 employees. Contractors with less than 50 employees would not be subject to the new requirements affirmative action requirements in subpart C of the rule. OFCCP's analysis of the impact on small entities compared the estimated cost of compliance with the final rule for small entities to the estimated annual receipts of these entities as provided by the SBA. If the estimated compliance costs are less than 1 percent of the estimated revenues, OFCCP considers it appropriate to conclude that there is no significant economic impact.<sup>50</sup>

### **Contractors with 50-100 Employees**

We estimate the first-year cost of this rule to a contractor with 50 to 100 employees to be approximately \$3,318. The first-year cost of the rule is the year with the highest compliance cost as the contractor is incurring the start-up costs of the rule. This primarily includes the time contractors will expend reviewing the new requirements of the rule and costs for reasonable accommodations for approximately five newly hired

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<sup>50</sup> Id. at 18 (impact could be significant if the costs of compliance with the rule "exceeds 1% of the gross revenues of the entities in a particular sector.")

individuals with disabilities.<sup>51</sup>

In order to estimate the cost of this rule on an entity with 50 to 100 employees, we are applying the same type of compliance cost structure previously described in the above cost analysis. However, for this small contractor, we assume they would have a manual application process and not require costly human resources information systems changes. We further assume these contractors would expend: 3 hours manually conducting the data analysis required by the new 41 CFR 60-741.44(k); 3 hours conducting the utilization analysis; 4 hours having a manager review the new requirements of the rule; and incur approximately \$40 in copying costs in order to print out the newly required pre-offer invitation to self-identify for applicants. This also includes a cost of approximately \$2,500 for providing reasonable accommodation to at least five newly hired individuals with disabilities.<sup>52</sup>

Utilizing data from the SBA Office of Advocacy regarding average receipts for firms, OFCCP determined that entities with 50 to 100 employees average receipts of approximately \$14,079,844 per year.<sup>53</sup> The \$3,318 costs of compliance with the final

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<sup>51</sup> Individuals with disabilities make up 4.83 percent of the employed. The utilization goal under the final rule is 7 percent. To close the gap, federal contractors would need to hire an additional 594,580 disabled people. This amounts to an additional 2.37 employees per establishment or 8.75 employees per company. Some of these new hires may require reasonable accommodation. According to research conducted by the Job Accommodation Network (JAN), employers in the study reported that a high percentage (57%) of accommodations cost absolutely nothing. For the remaining 43%, the typical cost of providing a reasonable accommodation was approximately \$500.

<sup>52</sup> To close the current gap that exists between the target rate of employment for disabled individuals and the actual rate, firms would need to hire an additional 594,580 disabled individuals. This amounts to an additional 2.37 employees per establishment or 8.75 employees per company. This assumes 251,300 establishments and 67,919 companies. Under an alternative scenario of 171,275 establishments and 46,291 companies, the additional number of disabled hires per establishment and company is 3.52 and 13.02, respectively. According to research conducted by the Job Accommodation Network (JAN), employers in the study reported that a high percentage (57%) of accommodations cost absolutely nothing. For the remaining 43%, the typical cost of providing a reasonable accommodation was approximately \$500.

<sup>53</sup> In order to calculate this figure, OFCCP averaged the total receipts of firms with 50 to 99 employees provided by the SBA, Office of Advocacy. See Firm Size Data, [available at](#)

rule in the first year would be approximately .02 percent of the average value of receipts for these entities. Therefore, there is not a significant economic impact on contractors with 50 to 100 employees.

### **Contractors with 100-500 Employees**

We estimate the first-year cost of this rule to contractors with 100 to 500 employees to be approximately \$5,197. The first-year cost is the year with the highest compliance cost as the contractor is incurring the start-up costs of the rule. The start-up for contractors with 100 to 500 employees primarily includes modifying any existing web-based application and human resources information systems to include the pre-offer invitation to self-identify, becoming familiar with the new requirements of the rule, and costs for reasonable accommodations for approximately five newly hired individuals with disabilities.

In order to estimate the cost of this rule on contractors with 100 to 500 employees, we are applying the same type of compliance cost structure previously described in the above cost analysis. However, for this small contractor, we assume they may incur more costs analyzing data, establishing benchmarks, and modifying human resources information systems. Specifically, we assume these contractors would expend: 3 hours manually conducting the data analysis required by the new 41 CFR 60-741.44(k); 3 hours conducting the utilization analysis; 4 hours having a manager review the new requirements of the rule; and incur approximately \$40 in copying costs in order to print out the newly required pre-offer invitation to self-identify for applicants. We further

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[www.sba.gov/advo/research/data.html#us](http://www.sba.gov/advo/research/data.html#us). Since the data was issued in 2007, OFCCP utilized a compound 2007-2008 Consumer Price Index inflation rate equaling 6.8% (1.0285 x 1.0385) to calculate the 2009 average receipts of \$14,079,844 per year.

assume these contractors will spend approximately \$850 modifying their human resources information systems to accommodate the new pre-offer invitation to self-identify. This also includes a cost of approximately \$2,500 for providing reasonable accommodation to at least five newly hired individuals with disabilities.

Utilizing data from the SBA Office of Advocacy regarding average receipts for firms, OFCCP determined that entities with 100 to 500 employees average receipts of approximately \$43,547,170 per year.<sup>54</sup> The \$5,197 costs of compliance with the final rule in the first year would be approximately .01 percent of the average value of receipts for these entities. Therefore, there is not a significant economic impact on contractors with 50 to 500 employees.

Notwithstanding our determination that there is not a significant impact as a result of this rule, OFCCP considered and implemented a number of alternatives in the final rule as compared to what was proposed in the NPRM. As noted in the preamble, the final rule provides an exception that permits contractors with a total workforce of 100 or fewer employees to compare the individuals with disabilities in their entire workforce to the 7 percent goal. Further, the final rule does not adopt the following proposals: review personnel processes on an annual basis (§ 60-741.44(b)); review physical and mental qualification standards on an annual basis (§ 60-741(c)); establish linkage agreements with three disability-related agencies or organizations to increase connections between contractors and individuals with disabilities seeking employment (§ 60-741.44(f)); take

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<sup>54</sup> In order to calculate this figure, OFCCP averaged the total receipts of firms with 100 to 499 employees provided by the SBA, Office of Advocacy. See Firm Size Data, [available at www.sba.gov/advo/research/data.html#us](http://www.sba.gov/advo/research/data.html#us). Since the data was issued in 2007, OFCCP utilized a compound 2007-2008 Consumer Price Index inflation rate equaling 6.8% (1.0285 x 1.0385) to calculate the 2009 average receipts of \$43,547,170 per year.



certain specified actions to internally disseminate its affirmative action policy (§ 60-741.44(g)); and train personnel on specific topics related to the employment of individuals with disabilities (§ 60-741.44(j)). After consideration of the comments and taking into account the expected utility of these provisions in light of the burden that contractors would incur to comply with the proposals, OFCCP decided not to incorporate the majority of these proposals into the final rule, and instead retains the language in the existing rule. These changes will substantially decrease the burden on small entities.

The significant benefits to individuals with disabilities, as well as to contractors, are discussed extensively in the Section-by-Section Analysis of the final rule and in the discussion of the final rule's conformity with Executive Order 12866. Although the primary objective of the final rule is to strengthen the affirmative action requirements of section 503 to employ and advance in employment individuals with disabilities, the rule will benefit both individuals with disabilities and contractors. As modified, the final rule provides contractors mechanisms for collecting data on applicants and employees with disabilities and promotes accountability by requiring contractors to review the effectiveness of their affirmative action efforts. The benefits of proactive recruitment particularly will accrue to individuals with disabilities who may face significant barriers in obtaining employment. The revisions will also promote access to a well-trained, job-ready employment pool for contractors.

#### **Paperwork Reduction Act**

Effective Date: This final rule is effective [INSERT DATE 180 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

Compliance Dates: Affected parties do not have to comply with the new information collection requirements in §§ 60-741.5(a), paragraph 7; 60-741.42; 60-741.44(f)(4); 60-741.44(k); 60-741.45; and 60-741.80(a) (requirement to maintain records under §§ 60-741.44(f)(4) and 60-741.44(k)) until the Department publishes a Notice in the Federal Register stating that the Office of Management and Budget (OMB) has approved these information collection requirements under the Paperwork Reduction Act of 1995 (PRA), or until this rule otherwise takes effect, whichever date is later.

The Department notes that no person is required to respond to a collection of information request unless the collection of information has a valid OMB Control Number. The new collections of information contained in this rulemaking have been submitted for review to OMB, in accordance with the PRA, under Control Number 1250-0004. That review is ongoing; consequently, the Control Number has not been activated. OFCCP will publish a Notice in the Federal Register announcing the results of OMB's review and the date the information collection requirements will take effect.

The information collection requirements in this final rule relate to the information required to be maintained by contractors regarding their nondiscrimination and affirmative action obligations concerning individuals with disabilities and disclosures workers may make to their employers.

Sections 60-741.40 through 60-741.44 contain currently approved collections of information. Section 60-741.40 requires contractors with 50 or more employees and contracts of \$50,000 or more to develop an affirmative action program for individuals with disabilities. An affirmative action program is a written program in which

contractors annually outline the steps the contractor will take and has already taken to ensure equal employment opportunity for individuals with disabilities. Section 60-741.41 describes a contractor's responsibility to make the affirmative action program available to all employees. Section 60-741.42 outlines the contractor's responsibilities and the process through which applicants are invited to self-identify as an individual with a disability.

Section 60-741.44 outlines the required contents of the affirmative action program. Contractors must develop and include an equal opportunity policy statement in the program. Contractors must also periodically review their personnel processes to ensure that individuals with disabilities are provided equal opportunity and that the contractor is engaged in outreach to recruitment sources. Further, contractors must develop procedures for disseminating the policy internally and externally and establish an audit and reporting system to measure the effectiveness of the affirmative action program.

The currently approved collections of information for these sections are OMB Control Number 1250-0004 (VEVRAA). Information collection package 1250-0004 covers the nondiscrimination and affirmative action requirements of VEVRAA and its implementing regulations. The VEVRAA information collection package estimates that first-time contractors will take 18 hours to develop and document a joint section 503/VEVRAA written affirmative action program. It estimates that existing contractors take 7.5 hours to document and maintain material evidence of annually updating the affirmative action program. These estimates are based on previously approved

information collection requests that quantified the estimated time to develop and maintain a joint section 503/VEVRAA written affirmative action program.

#### **A. Number of Respondents**

OFCCP estimates that 171,275 Federal contractor establishments will be impacted by the final rule. However, OFCCP received comments on the estimated number of contractor establishments, including recommending an establishment count of 285,390 using the Veterans Employment Training Services (VETS) annual report. While OFCCP declines to exclusively rely on the VETS report number, we present an estimated high end for the range of the cost of the rule based on a contractor establishment number of 251,300. This number is based on 2010 VETS data from their pending information collection request.<sup>55</sup>

For the purposes of this information collection request, OFCCP averaged the 171,275 and 251,300 contractor establishment figures to come up with a total of 211,287 establishments that will have to respond to the information collection requirements. All costs and hours in the burden analysis of this final rule are calculated using this adjusted number of federal contractor establishments. Further, the burden for several information collection requirements in the final rule are presented in ranges. These estimates are also averaged for this information collection request.

#### **B. Information Collections**

OFCCP's new information collection request under Control Number 1250-0005 for section 503 includes the burden hours and costs for the new information collection

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<sup>55</sup>OMB Control Number 1293-0005, Federal Contractor Veterans' Employment Report, VETS - 100/VETS-100A, [http://www.reginfo.gov/public/do/PRAViewDocument?ref\\_nbr=201104-1293-003](http://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201104-1293-003) (last accessed Aug. 13, 2013).

requirements outlined in the final rule. The burden for several information collection requirements in the final rule are presented in ranges. These estimates are averaged for the purposes of this information collection request.

#### New Standard Form – Voluntary Self-Identification of Disability

This information collection package requests approval of a new standard form entitled “Voluntary Self-Identification of Disability.” Pursuant to § 60-741.42, contractors will use this standard form to invite applicants, hires and employees, to identify as an individual with a disability pre-offer, post-offer, and through an invitation to all employees.

Section 60-741.42(a) requires contractors to extend a pre-offer invitation to self-identify as an “individual with a disability.” OFCCP estimates that contractors working at the company level will take 1.5 hours to review and retrieve existing sample invitations to self-identify, adopt the sample “as is” or make revisions to their existing form, save the invitation to self-identify and incorporate the document in the contractor’s application form.<sup>56</sup> The burden for this provision is 85,656 hours (57,104 contractor companies x 1.5 hours = 85,656 hours).

Applicants for available positions with covered Federal contractors will have a minimal burden complying with § 60-741.42(a) in the course of completing their application for employment with the contractor. Section 60-741.42(a), on pre-offer self-identification, requires contractors to invite all applicants to self-identify whether or not they are a protected veteran. OFCCP estimates that there will be an average of 24

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<sup>56</sup> OFCCP utilized the same ratio (approximately 3.7) of parent companies to number of establishments from the EEO-1 data to determine that among the universe of 251,300 establishments there are approximately 57,104 Federal contractor companies.

applicants per job vacancy for on average 15 vacancies per year. OFCCP further estimates that it will take applicants approximately 5 minutes to complete the form. The burden for this provision is 6,388,610 hours (211,287 contractor establishments x 15 listings x 24 applicants x 5 minutes/60 = 6,388,610 hours). This is a third-party disclosure.

OFCCP estimates that it will take contractors 1.5 hours to conduct the invitation to self-identify survey. This includes the time needed to set up procedures to conduct the invitation, distribute communications, and collect and track self-identification forms. OFCCP believes this process will become much more streamlined over time and will likely require significantly less than 1.5 hours in subsequent years. The estimated burden for this provision is 316,931 hours (211,287 contractor establishments x 90 minutes/60 = 316,930 hours).

Contractor employees will have to spend some time reviewing and/or completing the survey. There are approximately 27,400,000 Federal contractor employees. OFCCP estimates that employees will take 5 minutes to complete the self-identification form. The burden for this provision is 2,283,333 hours (27,400,000 employees x 5 minutes/60 = 2,283,333 hours). Utilizing Bureau of Labor Statistics data in the publication “Employer Costs for Employee Compensation” (September 2011), which lists an average total compensation for all civilian workers as \$30.11 per hour, the cost of this provision would be \$68,751,157.

OFCCP further estimates that it will take contractors 15 minutes to maintain self-identification forms. This time includes either manually storing the forms in a filing cabinet or saving them to an electronic database. The burden for this provision is 52,822

hours (211,287 contractor establishments x 15 minutes/60 = 52,822 hours).

Section 60-741.44 Required contents of the affirmative action program

OMB Control Number 1250-0004 contains the burden estimates for documenting and maintaining material evidence of annually updating a joint section 503 and VEVRAA affirmative action program. Therefore, there is no additional burden for this provision in this information collection request. OFCCP separately identified below, in § 60-741.44, provisions that are not included in burden estimates currently approved by 1250-0004.

- Section 60-741.44(f) External dissemination of policy, outreach and positive recruitment

Section 60-741.44(f)(1)(ii) requires contractors to send written notification of the company's affirmative action program policies to subcontractors, vendors, and suppliers. Section 60-300.44(f)(1)(ii) of the VEVRAA final rule also requires contractors to send written notification of the company policy related to its affirmative action efforts to all subcontractors, including subcontracting vendors and suppliers. OFCCP therefore expects that contractors will send a single, combined notice, informing subcontractors, vendors and suppliers of their VEVRAA and section 503 policies. Accordingly, OFCCP estimates that there is no additional burden for this provision.

Section 60-741.44(f)(4) requires a contractor to document all activities it undertakes to comply with the obligations of this paragraph, and retain these documents for a period of 3 years. OFCCP estimates that it will take contractors 10 minutes to maintain the outreach and recruitment documentation that would typically be generated as a result of their obligations pursuant to other provisions in the regulations. This does not include any additional time to make the software configuration needed to tell the

contractor's computer system to store data for an additional year, as this burden was previously accounted for in the VEVRAA final rule's burden analysis of § 60-300.80(b). Therefore, the recurring burden for this provision is 35,215 hours (211,287 contractor establishments x 10 minutes/60 = 35,215 hours).

- Section 60-741.44(h) Audit and Reporting System

Section 60-741.44(h)(1)(vi) requires contractors to document the actions taken to meet the requirements of 60-741.44(h), as mandated in the current regulations. OFCCP estimates that it will take contractors 10 minutes to document compliance with this existing provision. Documentation may include, as an example, the standard operating procedure of the system including roles and responsibilities, and audit and reporting timeframes and lifecycles. Because contractors are currently required to have an audit and reporting system, it is expected that some documentation of the process and operation of the system audit already exists. The annual recordkeeping burden of this provision is 35,215 (211,287 contractor establishments x 10 minutes = 856,375/60 = 35,215 hours).

- Section 60-741.44(k) Data Collection and Analysis

Section 60-741.44(k) requires contractors to collect and analyze certain categories of data. Based on feedback received from public comments expressing concerns about the costs of modifying human resources information systems, OFCCP believes that most contractors will have the capability to conduct the required calculations electronically. However, some companies may have to calculate this information manually. Therefore, OFCCP estimates that the average time to conduct the analysis and maintain the relevant documentation would be 1 hour 25 minutes. Relevant documentation could include the report or other written documentation generated by the calculations that explain the



methodology, the data used, and the findings and conclusions; the data used to conduct the calculations for subsequent validation of the results; and other material used by the contractor for the calculations. The recurring burden for this provision is 299,233 hours (251,300 contractor establishments x 85 minutes/60 = 299,233 hours).

No new software needs are anticipated for compliance with § 60-741.44(k), however, a software switch or configuration may be required to tell the system to retain the records for the additional 1 or 2 years, as appropriate. The estimated time needed for making this switch is included with the burden estimate for § 60-71.44(f)(4).

#### Section 60-741.45 Utilization Goal

Section 60-741.45 of the final rule requires contractors to conduct a utilization analysis to evaluate the representation of individuals with disabilities in each job group within the contractor's workforce with the utilization goal established in paragraph (a) of this section. OFCCP estimates that contractors will take 1 hour to conduct the utilization analysis. The burden for this provision is 211,287 hours (211,287 contractor establishments x 1 hour = 211,287 hours).

OFCCP further estimates that it will take contractors an additional 10 minutes to maintain records of the utilization analysis. The recordkeeping burden is 35,215 hours (211,287 contractor establishments x 10 minutes/60 = 35,215 hours).

#### Section 60-741.81 Access to records

Section 60-741.81 of the final rule requires contractors who are the subject of a compliance evaluation or complaint investigation to specify all available record formats and allow OFCCP to select preferred record formats from those identified by the contractor during a compliance evaluation. Pursuant to the regulations implementing the

PRA at 5 CFR 1320.4(a)(2), this information collection is excluded from the PRA requirements because it is related to an “administrative action, investigation, or audit involving an agency against specific individuals or entities.”

### **C. Summary of Costs**

The estimated cost to contractors is based on Bureau of Labor Statistics data in the publication “Employer Costs for Employee Compensation” (September 2011), which lists total compensation for management, professional, and related occupations as \$50.11 per hour and administrative support as \$23.72 per hour. OFCCP estimates that 52 percent of the burden hours will be management, professional, and related occupations and 48 percent will be administrative support.

**Table 1: Total Burden for §§60-741.42; 60-741.44; and 60-741.45**

Recordkeeping Burden Hours	633,861
Reporting Burden Hours	0
Third Party Disclosure Burden Hours	9,077,352
Total Burden Hours	9,711,213

**Table 2: Summary of Burden Hours and Costs for Contractors**

<b>PRA Burden</b>	<b>Burden Hours</b>	<b>Total</b>
<b>741.42 (Survey)</b>	316,931	\$11,866,765.33
<b>741.42 (Survey Employee Burden)</b>	2,283,333	\$68,751,166.67
<b>741.42 (Modifying</b>	85,656	\$2,342,234.35

<b>Application System)</b>		
<b>741.42 (Recordkeeping)</b>	52,822	\$1,977,794.22
<b>741.44(f)(4) (Recordkeeping Outreach Activities)</b>	52,822	\$1,977,794.22
<b>741.44(h) (Recordkeeping Affirmative Action Program Audit)</b>	35,215	\$1,318,529.48
<b>741.44(k) (Data Collection and Analysis)</b>	299,323	\$11,207,500.59
<b>741.45 (Utilization Analysis)</b>	211,287	\$7,911,176.88
<b>741.45 (Utilization Analysis Recordkeeping)</b>	35,215	\$1,318,529.48
<b>Total</b>	<b>3,372,603</b>	<b>\$108,671,491.22</b>

**Table 3: Summary of Non-Contractor Burden Hours and Costs**

<b>Existing Requirement</b>	<b>Burden Hours</b>	<b>Burden Costs</b>
Section 60-741.42 (Self-Identification)	6,338,610	\$190,855,547

The total estimated cost for applicants to fill out the self-identification form is based on Bureau of Labor Statistics data in the publication “Employer Costs for Employee Compensation” (September 2011), which lists an average total compensation for all civilian workers as \$30.11.

#### **D. Initial Capital or Start-up Costs**

##### **Human Resources Information Systems**

OFCCP estimates on average it will take each contractor, working at the company

level, on average 18 hours to have a professional make the needed systems modifications to track applicant and hiring information for individuals with disabilities. This includes IT and administrative professionals to make any necessary changes. The estimated costs for these modifications are based on data from the Bureau of Labor Statistics in the publication “Employer Costs for Employee Compensation” (September 2011), which lists total compensation for a professional of \$47.21 per hour. The cost for these modifications is \$48,525,837 (57,104 contractor companies x \$47.21 = \$48,525,837).

#### **5 CFR 1320.3(b)(1)(i) - Reviewing Instructions**

Several commenters noted that the proposed rule did not quantify the burden of reading and understanding the section 503 revisions on contractors. OFCCP acknowledges that 5 CFR 1320.3(b)(1)(i) requires agencies to include in the burden analysis for new information collection requirements the estimated time it takes for contractors to review and understand the instructions for compliance. In order to minimize the burden, OFCCP will publish several compliance assistance materials including factsheets and “Frequently Asked Questions.” OFCCP will also host webinars for the contractor community that will describe the key provisions in the final rule.

OFCCP estimates it will take, on average, 2.5 hours to have a management professional at each establishment either read compliance assistance materials provided by OFCCP or participate in an OFCCP webinar to learn about the new requirements of the final rule. The estimated cost of this burden is based on data from the Bureau of Labor Statistics in the publication “Employer Costs for Employee Compensation” (September 2011), which lists total compensation for a management professional at \$50.11. Therefore, the estimated burden for the capital and start-up costs is 528,217

hours (211,287 contractor establishments x 2.5 hours = 528,217 hours). We calculate the total estimated cost for rule familiarization as \$26,468,979 (528,217 hours x \$50.11/hour = \$26,468,979).

### **Operations and Maintenance Costs**

OFCCP estimates that the contractor will have some operations and maintenance costs in addition to the burden calculated above.

#### Section 60-741.42 Invitation to Self Identify

OFCCP estimates that the contractor will have some operations and maintenance cost associated with the invitations to self-identify. The contractor must invite all applicants to self-identify at both the pre-offer and post-offer stage of the employment process. Given the increasingly widespread use of electronic applications, any contractor that uses such applications would not incur copy costs. However, to account for contractors who may still choose to use paper applications, we are including printing and/or copying costs. Therefore, we estimate a single one page form for both the pre- and post-offer invitation. Assuming contractors using a paper-based application system, used 24 applications for an average of 15 listings per establishment, the minimum estimated total cost to contractors will be \$1,217,002 (42,257 establishments x 360 copies x \$.08 = \$1,217,002).

These paperwork burden estimates are summarized as follows:

Type of Review: New collection.

Agency: Office of Federal Contract Compliance Programs, Department of Labor.

Title: Section 503 of the Rehabilitation Act of 1973, as amended

OMB ICR Reference Number: 1250-0005

Affected Public: Business or other for-profit; individuals.

Estimated Number of Annual Responses: 9,711,213

Frequency of Response: On occasion.

Estimated Total Annual Burden Hours:

Estimated Total Initial and Other Costs: \$375,738,856

The estimated \$375,738,856 is the total of the PRA costs resulting from the new requirements of this final rule.

### **Small Business Regulatory Enforcement Fairness Act of 1996**

This rule is a major rule as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will result in an annual effect on the economy of \$100 million or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based companies to compete with foreign-based companies in domestic and export markets.

### **Unfunded Mandates Reform Act of 1995**

For purposes of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532, this final rule includes a Federal mandate that may result in excess of \$100 million in expenditures in the private sector in any one year. Accordingly, in compliance with 2 U.S.C. 1532, OFCCP provides the following written statement. All references to other sections of this final rule are incorporated by reference pursuant to 2 U.S.C. 1532(c).

- (1) The final rule is authorized by the section 503 of the Rehabilitation Act.
- (2) A qualitative and quantitative assessment of the anticipated costs and benefits

of this final rule, including the costs and benefits to the private sector, are set forth in the Regulatory Procedures section of the final rule (specifically the sections describing Executive Orders 12866 and 13563, the Regulatory Flexibility Act, and the Paperwork Reduction Act) and the Section-by-Section Analysis in the preamble to the final rule. OFCCP anticipates no effect of the final rule on health, safety, and the natural environment not otherwise discussed in the sections set forth above.

- (3) Estimates of future compliance costs are set forth in the Regulatory Procedures section of the final rule (specifically the sections describing Executive Orders 12866 and 13563, the Regulatory Flexibility Act, and the Paperwork Reduction Act). OFCCP anticipates none of the disproportionate budgetary effects of the final rule set forth in 2 U.S.C. 1532(a)(3)(B).
- (4) To the extent feasible and relevant, OFCCP has estimated the effect of the final rule on the national economy in the Regulatory Procedures section of the final rule (specifically the sections describing Executive Orders 12866 and 13563, the Regulatory Flexibility Act, and the Paperwork Reduction Act).
- (5) The provisions of 2 U.S.C. 1532(a)(5) do not apply to this final rule.

Finally, OFCCP identified, considered, and implemented a reasonable number of regulatory alternatives that were the least burdensome alternative. In those cases where OFCCP did not select the least burdensome alternative, it has provided an explanation of the reasons these suggestions were not adopted in the corresponding section of the Section-by-Section Analysis in the preamble to the final rule and/or the Regulatory Procedures section of the final rule (specifically the sections describing Executive Orders

12866 and 13563, the Regulatory Flexibility Act, and the Paperwork Reduction Act).

#### **Executive Order 13132 (Federalism)**

OFCCP has reviewed this final rule in accordance with Executive Order 13132 regarding federalism, and has determined that it does not have “federalism implications.” This rule will not “have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.”

#### **Executive Order 13175 (Consultation and Coordination with Indian Tribal Governments)**

This final rule does not have tribal implications under Executive Order 13175 that requires a tribal summary impact statement. The final rule does not have substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes or on the distribution of power and responsibilities between the Federal government and Indian tribes.

#### **Effects on Families**

The undersigned hereby certifies that the final rule would not adversely affect the well-being of families, as discussed under section 654 of the Treasury and General Government Appropriations Act, 1999.

#### **Executive Order 13045 (Protection of Children)**

This final rule would have no environmental health risk or safety risk that may



disproportionately affect children.

### **Environmental Impact Assessment**

A review of this final rule in accordance with the requirements of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 et seq.; the regulations of the Council on Environmental Quality, 40 CFR 1500 et seq.; and DOL NEPA procedures, 29 CFR part 11, indicates the final rule would not have a significant impact on the quality of the human environment. There is, thus, no corresponding environmental assessment or an environmental impact statement.

### **Executive Order 13211 (Energy Supply)**

This final rule is not subject to Executive Order 13211. It will not have a significant adverse effect on the supply, distribution, or use of energy.

### **Executive Order 12630 (Constitutionally Protected Property Rights)**

This final rule is not subject to Executive Order 12630 because it does not involve implementation of a policy that has takings implications or that could impose limitations on private property use.

### **Executive Order 12988 (Civil Justice Reform Analysis)**

This final rule was drafted and reviewed in accordance with Executive Order 12988 and will not unduly burden the Federal court system. The final rule was: (1) reviewed to eliminate drafting errors and ambiguities; (2) written to minimize litigation; and (3) written to provide a clear legal standard for affected conduct and to promote burden reduction.

**List of Subjects in 41 CFR Part 60-741**

Administrative practice and procedure, Civil rights, Employment, Equal employment opportunity, Government contracts, Government procurement, Individuals with disabilities, Investigations, and Reporting and recordkeeping requirements.

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**Patricia A. Shiu**

Director, Office of Federal Contract Compliance Programs

Accordingly, under authority of 29 U.S.C. 793, Title 41 of the Code of Federal Regulations, Chapter 60, part 60-741 is revised to read as follows:

**PART 60-741--AFFIRMATIVE ACTION AND NONDISCRIMINATION  
OBLIGATIONS OF FEDERAL CONTRACTORS AND SUBCONTRACTORS  
REGARDING INDIVIDUALS WITH DISABILITIES**

**Subpart A--Preliminary Matters, Equal Opportunity Clause**

Sec.

60-741.1 Purpose, applicability and construction.

60-741.2 Definitions.

60-741.3 Exceptions to the definitions of “disability” and “qualified individual.”

60-741.4 Coverage and waivers.

60-741.5 Equal opportunity clause.

**Subpart B--Discrimination Prohibited**

60-741.20 Covered employment activities.

60-741.21 Prohibitions.

60-741.22 Direct threat defense.

60-741.23 Medical examinations and inquiries.

60-741.24 Drugs and alcohol.

60-741.25 Health insurance, life insurance and other benefit plans.

### **Subpart C--Affirmative Action Program**

60-741.40 General purpose and applicability of the affirmative action program requirement.

60-741.41 Availability of affirmative action program.

60-741.42 Invitation to self-identify.

60-741.43 Affirmative action policy.

60-741.44 Required contents of affirmative action programs.

60-741.45 Utilization goals.

60-741.46 Voluntary affirmative action programs for employees with disabilities.

60-741.47 Sheltered workshops.

### **Subpart D--General Enforcement and Complaint Procedures**

60-741.60 Compliance evaluations.

60-741.61 Complaint procedures.

60-741.62 Conciliation agreements.

60-741.63 Violations of conciliation agreements.

60-741.64 Show cause notices.

60-741.65 Enforcement proceedings.

60-741.66 Sanctions and penalties.

60-741.67 Notification of agencies.

60-741.68 Reinstatement of ineligible contractors.

60-741.69 Intimidation and interference.

60-741.70 Disputed matters related to compliance with the act.

### **Subpart E--Ancillary Matters**

60-741.80 Recordkeeping.

60-741.81 Access to records.

60-741.82 Labor organizations and recruiting and training agencies.

60-741.83 Rulings and interpretations.

Appendix A to Part 60-741--Guidelines on a Contractor's Duty to Provide Reasonable Accommodation

Appendix B to Part 60-741--Developing Reasonable Accommodation Procedures

Authority: 29 U.S.C. 705 and 793; E.O. 11758 (3 CFR, 1971-1975 Comp., p. 841).

### **Subpart A--Preliminary Matters, Equal Opportunity Clause**

#### **§ 60-741.1 Purpose, applicability, and construction.**

(a) Purpose. The purpose of this part is to set forth the standards for compliance with section 503 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 793), which prohibits discrimination against individuals with disabilities and requires Government contractors and subcontractors to take affirmative action to employ and advance in employment qualified individuals with disabilities.

(b) Applicability. This part applies to all Government contracts and subcontracts in excess of \$10,000 for the purchase, sale or use of personal property or nonpersonal services (including construction): Provided, That subpart C of this part applies only as described in § 60-741.40(a). Compliance by the contractor with the provisions of this part will not necessarily determine its compliance with other statutes, and compliance with other statutes will not necessarily determine its compliance with this part: Provided, That compliance shall also satisfy the employment provisions of the Department of Labor's regulations implementing section 504 of the Rehabilitation Act of 1973 (see 29 CFR 32.2(b)) when the contractor is also subject to those requirements.

(c) Construction--(1) In general. Except as otherwise provided in this part, this part does not apply a lesser standard than the standards applied under title I of the Americans with Disabilities Act (ADA) of 1990, as amended, (42 U.S.C. 12101 et seq.) or the regulations issued by the Equal Employment Opportunity Commission pursuant to that title (29 CFR part 1630). The Interpretive Guidance on Title I of the Americans with Disabilities Act set out as an appendix to 29 CFR part 1630 issued pursuant to that title may be relied upon for guidance in interpreting the parallel non-discrimination provisions of this part.

(2) Benefits under State worker's compensation laws. Nothing in this part alters the standards for determining eligibility for benefits under State worker's compensation laws or under State and Federal disability benefit programs.

(3) Relationship to other laws. This part does not invalidate or limit the remedies, rights, and procedures under any Federal law or the law of any State or political subdivision that provides greater or equal protection for the rights of individuals with

disabilities as compared to the protection afforded by this part. It may be a defense to a charge of violation of this part that a challenged action is required or necessitated by another Federal law or regulation, or that another Federal law or regulation prohibits an action (including the provision of a particular reasonable accommodation) that would otherwise be required by this part.

#### **§ 60-741.2 Definitions.**

For the purpose of this part:

(a) Act means the Rehabilitation Act of 1973, as amended, 29 U.S.C. 706 and 793.

(b) Compliance evaluation means any one or combination of actions OFCCP may take to examine a Federal contractor's or subcontractor's compliance with one or more of the requirements of section 503 of the Rehabilitation Act of 1973.

(c) Contract means any Government contract or subcontract.

(d) Contractor means, unless otherwise indicated, a prime contractor or subcontractor holding a contract in excess of \$10,000.

(e) Direct threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual with a disability poses a direct threat shall be based on an individualized assessment of the individual's present ability to perform safely the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:



- (1) The duration of the risk;
- (2) The nature and severity of the potential harm;
- (3) The likelihood that the potential harm will occur; and
- (4) The imminence of the potential harm.

(f) Director means the Director, Office of Federal Contract Compliance Programs of the United States Department of Labor, or his or her designee.

(g) Disability – (1) The term disability means, with respect to an individual:

(i) A physical or mental impairment that substantially limits one or more major life activities of such individual;

(ii) A record of such an impairment; or

(iii) Being regarded as having such an impairment (as defined in paragraph (v) of this section).

(2) As used in this part, the definition of “disability” must be construed in favor of broad coverage of individuals, to the maximum extent permitted by law. The question of whether an individual meets the definition under this part should not demand extensive analysis.

(3) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

(4) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

(5) See paragraphs (m), (o), (t), (v), and (z) of this section, respectively, for definitions of “major life activities,” “physical or mental impairment,” “record of such an impairment,” “regarded as having such an impairment,” and “substantially limits.”

(6) See § 60-741.3 for exceptions to the definition of “disability.”

(h) Equal opportunity clause means the contract provisions set forth in § 60-741.5, “Equal opportunity clause.”

(i) Essential functions – (1) In general. The term essential functions means fundamental job duties of the employment position the individual with a disability holds or desires. The term essential functions does not include the marginal functions of the position.

(2) A job function may be considered essential for any of several reasons, including but not limited to the following:

(i) The function may be essential because the reason the position exists is to perform that function;

(ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed; and/or

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

(3) Evidence of whether a particular function is essential includes, but is not limited to:

(i) The contractor’s judgment as to which functions are essential;

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

(j) Government means the Government of the United States of America.

(k) Government contract means any agreement or modification thereof between any contracting agency and any person for the purchase, sale or use of personal property or nonpersonal services (including construction). The term Government contract does not include agreements in which the parties stand in the relationship of employer and employee, and federally assisted contracts.

(1) Construction, as used in paragraphs (k) and (x)(1) of this section, means the construction, rehabilitation, alteration, conversion, extension, demolition, or repair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services. The term also includes the supervision, inspection, and other on-site functions incidental to the actual construction.

(2) Contracting agency means any department, agency, establishment, or instrumentality of the United States, including any wholly owned Government corporation, which enters into contracts.

(3) Modification means any alteration in the terms and conditions of a contract, including supplemental agreements, amendments, and extensions.

(4) Nonpersonal services, as used in paragraphs (k) and (x)(1) of this section, includes, but is not limited to, the following: utility, construction, transportation, research, insurance, and fund depository.

(5) Person, as used in paragraphs (k), (p), (u), (x), and (y) of this section, means any natural person, corporation, partnership or joint venture, unincorporated association, State

or local government, and any agency, instrumentality, or subdivision of such a government.

(6) Personal property, as used in paragraphs (k) and (x)(1) of this section, includes supplies and contracts for the use of real property (such as lease arrangements), unless the contract for the use of real property itself constitutes real property (such as easements).

(l) Individual with a disability – See definition of “disability” in paragraph (g) of this section.

(m) Major life activities --(1) In general. Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working.

(2) Major bodily functions. For purposes of paragraph (m)(1) of this section, a major life activity also includes the operation of a major bodily function, including, but not limited to, functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, and reproductive functions. The operation of a major bodily function includes the operation of an individual organ within a body system.

(3) In determining other examples of major life activities, the term “major” shall not be interpreted strictly to create a demanding standard for disability. Whether an activity is a “major life activity” is not determined by reference to whether it is of “central importance to daily life.”

(n) Mitigating measures -- (1) In general. The term mitigating measures includes, but is not limited to:

(i) Medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

(ii) Use of assistive technology;

(iii) Reasonable accommodations or “auxiliary aids or services” (as defined by 42 U.S.C. 12103(1));

(iv) Learned behavioral or adaptive neurological modifications; or

(v) Psychotherapy, behavioral therapy, or physical therapy.

(2) Ordinary eyeglasses or contact lenses. The term ordinary eyeglasses or contact lenses means lenses that are intended to fully correct visual acuity or to eliminate refractive error.

(3) Low-vision devices. The term low-vision devices means devices that magnify, enhance, or otherwise augment a visual image, but not including ordinary eyeglasses or contact lenses.

(4) Auxiliary aids and services. The term auxiliary aids and services includes--

(i) Qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

(ii) Qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

(iii) Acquisition or modification of equipment or devices; and

(iv) Other similar services and actions.

(o) Physical or mental impairment means:

(1) Any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or

(2) Any mental or psychological disorder, such as an intellectual disability (formerly termed mental retardation), organic brain syndrome, emotional or mental illness, and specific learning disabilities.

(p) Prime contractor means any person holding a contract in excess of \$10,000, and, for the purposes of subpart D of this part, "General Enforcement and Complaint Procedures," includes any person who has held a contract subject to the act.

(q) Qualification standards means the personal and professional attributes including the skill, experience, education, physical, medical, safety, and other requirements established by the contractor as requirements which an individual must meet in order to be eligible for the position held or desired.

(r) Qualified individual means an individual who satisfies the requisite skill, experience, education, and other job-related requirements of the employment position such individual holds or desires, and who, with or without reasonable accommodation, can perform the essential functions of such position. See § 60-741.3 for exceptions to this definition.

(s) Reasonable accommodation -- (1) In general. The term reasonable accommodation means modifications or adjustments:

- (i) To a job application process that enable a qualified applicant with a disability to be considered for the position such applicant desires;<sup>1</sup> or
- (ii) To the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential functions of that position; or
- (iii) That enable the contractor's employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by the contractor's other similarly situated employees without disabilities.

(2) Reasonable accommodation may include but is not limited to:

- (i) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
- (ii) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices; appropriate adjustments or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

(3) To determine the appropriate reasonable accommodation it may be necessary for the contractor to initiate an informal, interactive process with the qualified individual with a

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<sup>1</sup> A contractor's duty to provide a reasonable accommodation with respect to applicants with disabilities is not limited to those who ultimately demonstrate that they are qualified to perform the job in issue. Applicants with disabilities must be provided a reasonable accommodation with respect to the application process if they are qualified with respect to that process (e.g., if they present themselves at the correct location and time to fill out an application).

disability in need of the accommodation.<sup>2</sup> This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations. (Appendix A of this part provides guidance on a contractor's duty to provide reasonable accommodation.)

(4) Individuals who meet the definition of "disability" solely under the "regarded as" prong of the definition of "disability" as defined in paragraph (v)(1) of this section are not entitled to receive reasonable accommodation.

(t) Record of such impairment means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities. An individual shall be considered to have a record of a disability if the individual has a history of an impairment that substantially limited one or more major life activities when compared to most people in the general population, or was misclassified as having had such an impairment.

(u) Recruiting and training agency means any person who refers workers to any contractor, or who provides or supervises apprenticeship or training for employment by any contractor.

(v) Regarded as having such an impairment -- (1) Except as provided in paragraph (v)(4) of this section, an individual is regarded as having such an impairment if the individual is subjected to an action prohibited under subpart B (Discrimination Prohibited) of these regulations because of an actual or perceived physical or mental impairment, whether or not the impairment substantially limits or is perceived to substantially limit a major life activity. Prohibited actions include but are not limited to

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<sup>2</sup> Before providing a reasonable accommodation, the contractor is strongly encouraged to verify with the individual with a disability that the accommodation will effectively meet the individual's needs.



refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment.

(2) Except as provided in paragraph (v)(4) of this section, an individual is regarded as having such an impairment any time a contractor takes a prohibited action against the individual because of an actual or perceived impairment, even if the contractor asserts, or may or does ultimately establish a defense to such action.

(3) Establishing that an individual is regarded as having such an impairment does not, by itself, establish liability for unlawful discrimination in violation of this part. Such liability is established only when an individual proves that a contractor discriminated on the basis of disability as prohibited by this part.

(4) Impairments that are transitory and minor. Paragraph (v)(1) of this section shall not apply to an impairment that is shown by the contractor to be transitory and minor. The contractor must demonstrate that the impairment is *both* “transitory” *and* “minor.”

Whether the impairment at issue is or would be “transitory and “minor” is to be determined objectively. The fact that a contractor subjectively believed the impairment was transitory and minor is not sufficient to defeat an individual’s coverage under paragraph (v)(1) of this section.

(i) An impairment is transitory if it has an actual or expected duration of six months or less.

(ii) [Reserved]

(w) Secretary means the Secretary of Labor, United States Department of Labor, or his or her designee.

(x) Subcontract means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

(1) For the purchase, sale or use of personal property or nonpersonal services (including construction) which, in whole or in part, is necessary to the performance of any one or more contracts; or

(2) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken, or assumed.

(y) Subcontractor means any person holding a subcontract in excess of \$10,000 and, for the purposes of subpart D of this part, "General Enforcement and Complaint Procedures," any person who has held a subcontract subject to the act.

(z) Substantially limits -- (1) In general. The term "substantially limits" shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by law. Substantially limits is not meant to be a demanding standard and should not demand extensive analysis.

(i) An impairment is substantially limiting within the meaning of this section if it substantially limits the ability of an individual to perform a major life activity as compared to most people in the general population. An impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered "substantially limiting." Nonetheless, not every impairment will constitute a disability within the meaning of this section.

(ii) The comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population

usually will not require scientific, medical, or statistical analysis. However, nothing in this section is intended to prohibit the presentation of scientific, medical, or statistical evidence to make such a comparison where appropriate.

(iii) In determining whether an individual is substantially limited in a major life activity, it may be useful in appropriate cases to consider, as compared to most people in the general population, the condition under which the individual performs the major life activity; the manner in which the individual performs the major life activity; and/or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity. This may include consideration of facts such as the difficulty, effort, or time required to perform a major life activity; pain experienced when performing a major life activity; the length of time a major life activity can be performed; and/or the way an impairment affects the operation of a major bodily function.

(2) Non-applicability to the “regarded as” prong. Whether an individual’s impairment substantially limits a major life activity is not relevant to a determination of whether the individual is regarded as having a disability within the meaning of paragraph (g)(1)(iii) of this section.

(3) Ameliorative effects of mitigating measures. Except as provided in paragraph (z)(3)(i) of this section, the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures as defined in paragraph (n) of this section.

(i) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered when determining whether an impairment substantially

limits a major life activity. See paragraph (n)(2) of this section for a definition of “ordinary eyeglasses or contact lenses.”

(ii) Non-ameliorative effects of mitigating measures. The non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen, may be considered when determining whether an individual’s impairment substantially limits a major life activity.

(4) In determining whether an individual is substantially limited the focus is on how a major life activity is substantially limited, and not on the outcomes an individual can achieve. For example, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population.

(5) Predictable assessments. The determination of whether an impairment substantially limits a major life activity requires an individualized assessment. However, the principles set forth in this section are intended to provide for generous coverage through a framework that is predictable, consistent, and workable for all individuals and contractors with rights and responsibilities under this part. Therefore, the individualized assessment of some types of impairments will, in virtually all cases, result in a determination of coverage under paragraph (g)(1)(i) or (ii) of this section. Given their inherent nature, these types of impairments will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity. With respect to these types of impairments, the necessary individualized assessment should be particularly

simple and straightforward.

(i) Examples of predictable assessments. Applying the principles set forth in this section it should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated: deafness substantially limits hearing; blindness substantially limits seeing; an intellectual disability (formerly termed mental retardation) substantially limits brain function; partially or completely missing limbs or mobility impairments requiring the use of a wheelchair substantially limit musculoskeletal function; autism substantially limits brain function; cancer substantially limits normal cell growth; cerebral palsy substantially limits brain function; diabetes substantially limits endocrine function; epilepsy substantially limits neurological function; Human Immunodeficiency Virus (HIV) infection substantially limits immune function; multiple sclerosis (MS) substantially limits neurological function; muscular dystrophy substantially limits neurological function; and major depressive disorder, bipolar disorder, post-traumatic stress disorder (PTSD), obsessive compulsive disorder, and schizophrenia substantially limit brain function. The types of impairments described in this section may also substantially limit additional major life activities not explicitly listed above.

(ii) [Reserved]

(aa) Undue hardship--(1) In general. Undue hardship means, with respect to the provision of an accommodation, significant difficulty or expense incurred by the contractor, when considered in light of the factors set forth in paragraph (aa)(2) of this section.

(2) Factors to be considered. In determining whether an accommodation would impose

an undue hardship on the contractor, factors to be considered include:

(i) The nature and net cost of the accommodation needed, taking into consideration the availability of tax credits and deductions, and/or outside funding;

(ii) The overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources;

(iii) The overall financial resources of the contractor, the overall size of the business of the contractor with respect to the number of its employees, and the number, type and location of its facilities;

(iv) The type of operation or operations of the contractor, including the composition, structure and functions of the work force of such contractor, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in question to the contractor; and

(v) The impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facility's ability to conduct business.

(bb) United States, as used herein, shall include the several States, the District of Columbia, the Virgin Islands, the Commonwealth of Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and Wake Island.

**§ 60-741.3 Exceptions to the definitions of “disability” and “qualified individual.”**

(a) Current illegal use of drugs--(1) In general. The terms “disability” and “qualified individual” do not include individuals currently engaging in the illegal use of drugs, when

the contractor acts on the basis of such use.

(2) “Drug” defined. The term drug means a controlled substance, as defined in schedules I through V of Section 202 of the Controlled Substances Act (21 U.S.C. 812).

(3) “Illegal use of drugs” defined. The term illegal use of drugs means the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act, as updated pursuant to that act. Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

(4) Construction. (i) Nothing in paragraph (a)(1) of this section shall be construed to exclude from the definition of disability or qualified individual an individual who:

(A) Has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in the illegal use of drugs;

(B) Is participating in a supervised rehabilitation program and is no longer engaging in such use; or

(C) Is erroneously regarded as engaging in such use, but is not engaging in such use.

(ii) In order to be protected by section 503 and this part, an individual described in paragraph (a)(4)(i) of this section must, as appropriate, satisfy the requirements of the definition of disability and qualified individual.

(5) Drug testing. It shall not be a violation of this part for the contractor to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraphs (a)(4)(i)(A) and (B) of this section is no longer engaging in the illegal use of drugs. (See § 60-741.24(b)(1).)

(b) Alcoholics-- (1) In general. The terms disability and qualified individual do not include an individual who is an alcoholic whose current use of alcohol prevents such individual from performing the essential functions of the employment position such individual holds or desires or whose employment, by reason of such current alcohol abuse, would constitute a direct threat to property or to the health or safety of the individual or others.

(2) Duty to provide reasonable accommodation. Nothing in paragraph (b)(1) of this section shall relieve the contractor of its obligation to provide a reasonable accommodation for an individual described in paragraph (b)(1) of this section when such an accommodation will enable the individual to perform the essential functions of the employment position such individual holds or desires, or when the accommodation will eliminate or reduce the direct threat to the health or safety of the individual or others posed by such individual, provided that such individual satisfies the requisite skill, experience, education, and other job-related requirements of such position.

(c) Contagious disease or infection-- (1) In general. The terms disability and qualified individual do not include an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of the individual or others or who, by reason of the currently contagious disease or infection, is unable to perform the essential functions of the employment position such individual holds or desires.

(2) Duty to provide reasonable accommodation. Nothing in paragraph (c)(1) of this section shall relieve the contractor of its obligation to provide a reasonable accommodation for an individual described in paragraph (c)(1) of this section when such



an accommodation will enable the individual to perform the essential functions of the employment position such individual holds or desires, or when the accommodation will eliminate or reduce the direct threat to the health or safety of the individual or others posed by such individual, provided that such individual satisfies the requisite skill, experience, education, and other job-related requirements of such position.

(d) Homosexuality and bisexuality. Homosexuality and bisexuality are not impairments and so are not disabilities as defined in this part.

(e) Other conditions. The term disability does not include:

- (1) Transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;
- (2) Compulsive gambling, kleptomania, or pyromania; or
- (3) Psychoactive substance use disorders resulting from current illegal use of drugs.

#### **§ 60-741.4 Coverage and waivers.**

(a) Coverage-- (1) Contracts and subcontracts in excess of \$10,000. Contracts and subcontracts in excess of \$10,000 are covered by this part. No contracting agency or contractor shall procure supplies or services in less than usual quantities to avoid the applicability of the equal opportunity clause.

(2) Contracts and subcontracts for indefinite quantities. With respect to indefinite delivery-type contracts and subcontracts (including, but not limited to, open end contracts, requirement-type contracts, Federal Supply Schedule contracts, “call-type” contracts, and purchase notice agreements), the equal opportunity clause shall be included unless the contracting agency has reason to believe that the amount to be

ordered in any year under such contract will not be in excess of \$10,000. The applicability of the equal opportunity clause shall be determined at the time of award for the first year and annually thereafter for succeeding years, if any. Notwithstanding the above, the equal opportunity clause shall be applied to such contract whenever the amount of a single order exceeds \$10,000. Once the equal opportunity clause is determined to be applicable, the contract shall continue to be subject to such clause for its duration, regardless of the amounts ordered, or reasonably expected to be ordered in any year.

(3) Employment activities within the United States. This part applies only to employment activities within the United States and not to employment activities abroad. The term employment activities within the United States includes actual employment within the United States, and decisions of the contractor made within the United States, pertaining to the contractor's applicants and employees who are within the United States, regarding employment opportunities abroad (such as recruiting and hiring within the United States for employment abroad, or transfer of persons employed in the United States to contractor establishments abroad).

(4) Contracts with State or local governments. The requirements of the equal opportunity clause in any contract or subcontract with a State or local government (or any agency, instrumentality or subdivision thereof) shall not be applicable to any agency, instrumentality or subdivision of such government which does not participate in work on or under the contract or subcontract.

(b) Waivers -- (1) Specific contracts and classes of contracts. The Director may waive the application to any contract of the equal opportunity clause in whole or part when he

or she deems that special circumstances in the national interest so require. The Director may also grant such waivers to groups or categories of contracts: where it is in the national interest; where it is found impracticable to act upon each request individually; and where such waiver will substantially contribute to convenience in administration of the act. When a waiver has been granted for any class of contracts, the Director may withdraw the waiver for a specific contract or group of contracts to be awarded, when in his or her judgment such action is necessary or appropriate to achieve the purposes of the act. The withdrawal shall not apply to contracts awarded prior to the withdrawal, except that in procurements entered into by formal advertising, or the various forms of restricted formal advertising, such withdrawal shall not apply unless the withdrawal is made more than 10 calendar days before the date set for the opening of the bids.

(2) National security. Any requirement set forth in the regulations of this part shall not apply to any contract whenever the head of the contracting agency determines that such contract is essential to the national security and that its award without complying with such requirements is necessary to the national security. Upon making such a determination, the head of the contracting agency will notify the Director in writing within 30 days.

(3) Facilities not connected with contracts. (i) Upon the written request of the contractor, the Director may waive the requirements of the equal opportunity clause with respect to any of a contractor's facilities if the Director finds that the contractor has demonstrated that:

(A) The facility is in all respects separate and distinct from activities of the contractor related to the performance of a contract; and

(B) Such a waiver will not interfere with or impede the effectuation of the act.

(ii) The Director's findings as to whether the facility is separate and distinct in all respects from activities of the contractor related to the performance of a contract shall include consideration of the following factors:

(A) Whether any work at the facility directly or indirectly supports or contributes to the satisfaction of the work performed on a Government contract;

(B) The extent to which the facility benefits, directly or indirectly, from a Government contract;

(C) Whether any costs associated with operating the facility are charged to a Government contract;

(D) Whether working at the facility is a prerequisite for advancement in job responsibility or pay, and the extent to which employees at facilities connected to a Government contract are recruited for positions at the facility;

(E) Whether employees or applicants for employment at the facility may perform work related to a Government contract at another facility, and the extent to which employees at the facility are interchangeable with employees at facilities connected to a Government contract; and

(F) Such other factors that the Director deems are necessary or appropriate for considering whether the facility is in all respects separate and distinct from the activities of the contractor related to the performance of a contract.

(iii) The Director's findings as to whether granting a waiver will interfere with or

impede the effectuation of the act shall include consideration of the following factors:

(A) Whether the waiver will be used as a subterfuge to circumvent the contractor's obligations under the act;

(B) The contractor's compliance with the act or any other Federal, State or local law requiring equal opportunity for disabled persons;

(C) The impact of granting the waiver on OFCCP enforcement efforts; and

(D) Such other factors that the Director deems are necessary or appropriate for considering whether the granting of the waiver would interfere with or impede the effectuation of the act.

(iv) A contractor granted a waiver under paragraph (b)(3) of this section shall:

(A) Promptly inform the Director of any changed circumstances not reflected in the contractor's waiver request; and

(B) Permit the Director access during normal business hours to the contractor's places of business for the purpose of investigating whether the facility granted a waiver meets the standards and requirements of paragraph (b)(3) of this section, and for inspecting and copying such books and accounts and records, including computerized records, and other material as may be relevant to the matter under investigation.

(v)(A) A waiver granted under paragraph (b)(3) of this section shall terminate on one of the following dates, whichever is earliest:

(1) Two years after the date the waiver was granted.

(2) When the facility performs any work that directly supports or contributes to the satisfaction of the work performed on a Government contract.

(3) When the Director determines, based on information provided by the contractor under this section or upon any other relevant information, that the facility does not meet the requirements of paragraph (b)(3) of this section.

(B) When a waiver terminates in accordance with paragraph (b)(3)(v)(A) of this section the contractor shall ensure that the facility complies with this part on the date of termination, except that compliance with §§ 60-741.40 through 60-741.44, if applicable, must be attained within 120 days of such termination.

(vi) False or fraudulent statements or representations made by a contractor under paragraph (b)(3) of this section are prohibited and may subject the contractor to sanctions and penalties under this part and criminal prosecution under 18 U.S.C. 1001.

#### **§ 60-741.5 Equal opportunity clause.**

(a) Government contracts. Each contracting agency and each contractor shall include the following equal opportunity clause in each of its covered Government contracts or subcontracts (and modifications, renewals, or extensions thereof if not included in the original contract):

##### **EQUAL OPPORTUNITY FOR WORKERS WITH DISABILITIES**

1. The contractor will not discriminate against any employee or applicant for employment because of physical or mental disability in regard to any position for which the employee or applicant for employment is qualified. The contractor agrees to take affirmative action to employ and advance in employment individuals with disabilities, and to treat qualified individuals without discrimination on the basis of their physical or mental disability in all employment practices, including the following:

- i. Recruitment, advertising, and job application procedures;
- ii. Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff and rehiring;

- iii. Rates of pay or any other form of compensation and changes in compensation;
- iv. Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;
- v. Leaves of absence, sick leave, or any other leave;
- vi. Fringe benefits available by virtue of employment, whether or not administered by the contractor;
- vii. Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, and selection for leaves of absence to pursue training;
- viii. Activities sponsored by the contractor including social or recreational programs; and
- ix. Any other term, condition, or privilege of employment.

2. The contractor agrees to comply with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the act.

3. In the event of the contractor's noncompliance with the requirements of this clause, actions for noncompliance may be taken in accordance with the rules, regulations, and relevant orders of the Secretary of Labor issued pursuant to the act.

4. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices in a form to be prescribed by the Director, Office of Federal Contract Compliance Programs, provided by or through the contracting officer. Such notices shall state the rights of applicants and employees as well as the contractor's obligation under the law to take affirmative action to employ and advance in employment qualified employees and applicants with disabilities. The contractor must ensure that applicants or employees with disabilities are provided the notice in a form that is accessible and understandable to the individual applicant or employee (e.g., providing Braille or large print versions of the notice, or posting a copy of the notice at a lower height for easy viewing by a person using a wheelchair). With respect to employees who do not work at a physical location of the contractor, a contractor will satisfy its posting obligations by posting such notices in an electronic format, provided that the contractor provides computers, or access to computers, that can access the electronic posting to such employees, or the contractor has actual knowledge that such employees otherwise are able to access the electronically posted notices. Electronic notices for employees must be posted in a conspicuous location and format on the company's intranet or sent by electronic mail to employees. An electronic posting must be used by the contractor to notify job applicants of their rights if the contractor utilizes an electronic application process. Such electronic applicant notice must be conspicuously stored with, or as part of, the electronic application.

5. The contractor will notify each labor organization or representative of workers with which it has a collective bargaining agreement or other contract understanding, that the contractor is bound by the terms of section 503 of the Rehabilitation Act of 1973, as amended, and is committed to take affirmative action to employ and advance in employment, and shall not discriminate against, individuals with physical or mental disabilities.

6. The contractor will include the provisions of this clause in every subcontract or purchase order in excess of \$10,000, unless exempted by the rules, regulations, or orders of the Secretary issued pursuant to section 503 of the act, as amended, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as the Director, Office of Federal Contract Compliance Programs may direct to enforce such provisions, including action for noncompliance.

7. The contractor must, in all solicitations or advertisements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment and will not be discriminated against on the basis of disability.

[End of Clause]

(b) Subcontracts. Each contractor shall include the equal opportunity clause in each of its subcontracts subject to this part.

(c) Adaption of language. Such necessary changes in language may be made to the equal opportunity clause as shall be appropriate to identify properly the parties and their undertakings.

(d) Inclusion of the equal opportunity clause in the contract. It is not necessary to include the equal opportunity clause verbatim in the contract. The clause shall be made a part of the contract by citation to 41 CFR 60-741.5(a) and inclusion of the following language, in bold text, after the citation: “This contractor and subcontractor shall abide by the requirements of 41 CFR 60-741.5(a). This regulation prohibits discrimination against qualified individuals on the basis of disability, and requires affirmative action by covered prime contractors and subcontractors to employ and advance in employment qualified individuals with disabilities.”



(e) Incorporation by operation of the act. By operation of the act, the equal opportunity clause shall be considered to be a part of every contract and subcontract required by the act and the regulations in this part to include such a clause, whether or not it is physically incorporated in such contract and whether or not there is a written contract between the agency and the contractor.

(f) Duties of contracting agencies. Each contracting agency shall cooperate with the Director and the Secretary in the performance of their responsibilities under the act. Such cooperation shall include insuring that the equal opportunity clause is included in all covered Government contracts and that contractors are fully informed of their obligations under the act and this part, providing the Director with any information which comes to the agency's attention that a contractor is not in compliance with the act or this part, responding to requests for information from the Director, and taking such actions for noncompliance as are set forth in § 60-741.66 as may be ordered by the Secretary or the Director.

## **Subpart B—Discrimination Prohibited**

### **§ 60-741.20 Covered employment activities.**

The prohibition against discrimination in this part applies to the following employment activities:

- (a) Recruitment, advertising, and job application procedures;
- (b) Hiring, upgrading, promotion, award of tenure, demotion, transfer, layoff, termination, right of return from layoff, and rehiring;

- (c) Rates of pay or any other form of compensation and changes in compensation;
- (d) Job assignments, job classifications, organizational structures, position descriptions, lines of progression, and seniority lists;
- (e) Leaves of absence, sick leave, or any other leave;
- (f) Fringe benefits available by virtue of employment, whether or not administered by the contractor;
- (g) Selection and financial support for training, including apprenticeships, professional meetings, conferences and other related activities, and selection for leaves of absence to pursue training;
- (h) Activities sponsored by the contractor including social and recreational programs; and
- (i) Any other term, condition, or privilege of employment.

**§ 60-741.21 Prohibitions.**

(a) The term discrimination includes, but is not limited to, the acts described in this section and § 60-741.23.

(1) Disparate treatment. It is unlawful for the contractor to deny an employment opportunity or benefit or otherwise to discriminate against a qualified individual on the basis of disability.

(2) Limiting, segregating and classifying. Unless otherwise permitted by this part, it is unlawful for the contractor to limit, segregate, or classify a job applicant or employee in a way that adversely affects his or her employment opportunities or status on the basis of disability. For example, the contractor may not segregate employees into separate work

areas or into separate lines of advancement on the basis of disability.

(3) Contractual or other arrangements--(i) In general. It is unlawful for the contractor to participate in a contractual or other arrangement or relationship that has the effect of subjecting the contractor's own qualified applicant or employee with a disability to the discrimination prohibited by this part.

(ii) Contractual or other arrangement defined. The phrase contractual or other arrangement or relationship includes, but is not limited to, a relationship with: an employment or referral agency; a labor organization, including a collective bargaining agreement; an organization providing fringe benefits to an employee of the contractor; or an organization providing training and apprenticeship programs.

(iii) Application. This paragraph (a)(3) applies to the contractor, with respect to its own applicants or employees, whether the contractor offered the contract or initiated the relationship, or whether the contractor accepted the contract or acceded to the relationship. The contractor is not liable for the actions of the other party or parties to the contract which only affect that other party's employees or applicants.

(4) Standards, criteria or methods of administration. It is unlawful for the contractor to use standards, criteria, or methods of administration, that are not job-related and consistent with business necessity, and that:

- (i) Have the effect of discriminating on the basis of disability; or
- (ii) Perpetuate the discrimination of others who are subject to common administrative control.

(5) Relationship or association with an individual with a disability. It is unlawful for the contractor to exclude or deny equal jobs or benefits to, or otherwise discriminate

against, a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a family, business, social, or other relationship or association.

(6) Not making reasonable accommodation. (i) It is unlawful for the contractor to fail to make reasonable accommodation to the known physical or mental limitations of an otherwise qualified applicant or employee with a disability as defined in §§ 60-741.2(g)(1)(i) or (ii), unless such contractor can demonstrate that the accommodation would impose an undue hardship on the operation of its business.

(ii) It is unlawful for the contractor to deny employment opportunities to an otherwise qualified job applicant or employee with a disability based on the need of such contractor to make reasonable accommodation to such an individual's physical or mental impairments.

(iii) The reasonable accommodation obligation extends to the contractor's use of electronic or online job application systems. If a contractor uses such a system, it must provide necessary reasonable accommodation to ensure that an otherwise qualified individual with a disability who is not able to fully utilize that system is nonetheless provided with equal opportunity to apply and be considered for all jobs. Though not required by this part, it is a best practice for the contractor to make its online job application system accessible and compatible with assistive technologies used by individuals with disabilities.

(iv) A qualified individual with a disability is not required to accept an accommodation, aid, service, opportunity, or benefit which such qualified individual chooses not to accept. However, if such individual rejects a reasonable accommodation, aid, service,

opportunity or benefit that is necessary to enable the individual to perform the essential functions of the position held or desired, and cannot, as a result of that rejection, perform the essential functions of the position, the individual will not be considered a qualified individual with a disability.

(v) A contractor is not required to provide reasonable accommodation to an individual who satisfies only the “regarded as having such an impairment” prong of the definition of “disability,” as defined in § 60- 741.2(v)(1).

(vi) Reasonable accommodation procedures. The development and use of written procedures for processing requests for reasonable accommodation is a best practice that may assist the contractor in meeting its reasonable accommodation obligations under section 503 and this part. Such procedures help ensure that applicants and employees are informed as to how to request a reasonable accommodation and are aware of how such a request will be processed by the contractor. They also help ensure that the contractor’s supervisors and managers know what to do should they receive a request for reasonable accommodation, and that all requests for accommodation are processed swiftly, within a reasonable period of time. The development and use of written reasonable accommodation procedures is not required by this part, and it is not a violation of this part for a contractor not to have or use such procedures. However, Appendix B of this part provides guidance to contractors that choose to develop and use written reasonable accommodation procedures.

(7) Qualification standards, tests and other selection criteria--(i) In general. It is unlawful for the contractor to use qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability or a

class of individuals with disabilities, on the basis of disability, unless the standard, test, or other selection criterion, as used by the contractor, is shown to be job-related for the position in question and is consistent with business necessity. Selection criteria that concern an essential function may not be used to exclude an individual with a disability if that individual could satisfy the criteria with provision of a reasonable accommodation. Selection criteria that exclude or tend to exclude an individual with a disability or a class of individuals with disabilities on the basis of disability but concern only marginal functions of the job would not be consistent with business necessity. The contractor may not refuse to hire an applicant with a disability because the applicant's disability prevents him or her from performing marginal functions.

(ii) Qualification standards and tests related to uncorrected vision. It is unlawful for the contractor to use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless the standard, test, or other selection criteria, as used by the contractor, is shown to be job-related for the position in question and consistent with business necessity. An individual challenging a contractor's application of a qualification standard, test, or other criterion based on uncorrected vision need not be an individual with a disability, but must be adversely affected by the application of the standard, test, or other criterion.

(iii) The Uniform Guidelines on Employee Selection Procedures, 41 CFR part 60-3, do not apply to the Rehabilitation Act and are similarly inapplicable to this part.

(8) Administration of tests. It is unlawful for the contractor to fail to select and administer tests concerning employment in the most effective manner to ensure that, when a test is administered to a job applicant or employee who has a disability that

impairs sensory, manual, or speaking skills, the test results accurately reflect the skills, aptitude, or whatever other factor of the applicant or employee that the test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant, except where such skills are the factors that the test purports to measure.

(9) Compensation. In offering employment or promotions to individuals with disabilities, it is unlawful for the contractor to reduce the amount of compensation offered because of any income based upon a disability-related pension or other disability-related benefit the applicant or employee receives from another source. Nor may the contractor reduce the amount of compensation offered to an individual with a disability because of the actual or anticipated cost of a reasonable accommodation the individual needs or may request.

(b) Claims of No Disability. Nothing in this part shall provide the basis for a claim that an individual without a disability was subject to discrimination because of the lack of disability, or because an individual with a disability was granted an accommodation that was denied to an individual without a disability.

#### **§ 60-741.22 Direct threat defense.**

The contractor may use as a qualification standard the requirement that an individual be able to perform the essential functions of the position held or desired without posing a direct threat to the health or safety of the individual or others in the workplace. (See § 60-741.2(e) defining direct threat.)

**§ 60-741.23 Medical examinations and inquiries.**

(a) Prohibited medical examinations or inquiries. Except as stated in paragraphs (b) and (c) of this section, it is unlawful for the contractor to require a medical examination of an applicant or employee or to make inquiries as to whether an applicant or employee is an individual with a disability or as to the nature or severity of such disability.

(b) Permitted medical examinations and inquiries--(1) Acceptable pre-employment inquiry. The contractor may make pre-employment inquiries into the ability of an applicant to perform job-related functions, and/or may ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions.

(2) Employment entrance examination. The contractor may require a medical examination (and/or inquiry) after making an offer of employment to a job applicant and before the applicant begins his or her employment duties, and may condition an offer of employment on the results of such examination (and/or inquiry), if all entering employees in the same job category are subjected to such an examination (and/or inquiry) regardless of disability.

(3) Examination of employees. The contractor may require a medical examination (and/or inquiry) of an employee that is job-related and consistent with business necessity. The contractor may make inquiries into the ability of an employee to perform job-related functions.

(4) Other acceptable examinations and inquiries. The contractor may conduct voluntary medical examinations and activities, including voluntary medical histories,



which are part of an employee health program available to employees at the work site. These medical examinations and activities do not have to be job-related and consistent with business necessity.

(5) Medical examinations conducted in accordance with paragraph (b)(2) of this section do not have to be job-related and consistent with business necessity. However, if certain criteria are used to screen out an applicant or applicants or an employee or employees with disabilities as a result of such examinations or inquiries, the contractor must demonstrate that the exclusionary criteria are job-related and consistent with business necessity, and that performance of the essential job functions cannot be accomplished with reasonable accommodations as required in this part.

(c) Invitation to self-identify. The contractor shall invite the applicant to self-identify as an individual with a disability as specified in § 60-741.42.

(d) Confidentiality and use of medical information. (1) Information obtained under this section regarding the medical condition or history of any applicant or employee shall be collected and maintained on separate forms and in separate medical files and treated as a confidential medical record, except that:

(i) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the applicant or employee and necessary accommodations;

(ii) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) Government officials engaged in enforcing the laws administered by OFCCP, including this part, or enforcing the Americans with Disabilities Act, as amended, shall be provided relevant information on request.

(2) Information obtained under this section regarding the medical condition or history of any applicant or employee shall not be used for any purpose inconsistent with this part.

**§ 60-741.24 Drugs and alcohol.**

(a) Specific activities permitted. The contractor:

(1) May prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

(2) May require that employees not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

(3) May require that all employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

(4) May hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior to which the contractor holds its other employees, even if any unsatisfactory performance or behavior is related to the employee's drug use or alcoholism;

(5) May require that its employees employed in an industry subject to such regulations comply with the standards established in the regulations (if any) of the Departments of Defense and Transportation, and of the Nuclear Regulatory Commission, and other Federal agencies regarding alcohol and the illegal use of drugs; and

(6) May require that employees employed in sensitive positions comply with the regulations (if any) of the Departments of Defense and Transportation, and of the Nuclear Regulatory Commission, and other Federal agencies that apply to employment in

sensitive positions subject to such regulations.

(b) Drug testing--(1) General policy. For purposes of this part, a test to determine the illegal use of drugs is not considered a medical examination. Thus, the administration of such drug tests by the contractor to its job applicants or employees is not a violation of § 60-741.23. Nothing in this part shall be construed to encourage, prohibit, or authorize the contractor to conduct drug tests of job applicants or employees to determine the illegal use of drugs or to make employment decisions based on such test results.

(2) Transportation employees. Nothing in this part shall be construed to encourage, prohibit, or authorize the otherwise lawful exercise by contractors subject to the jurisdiction of the Department of Transportation of authority to test employees in, and applicants for, positions involving safety-sensitive duties for the illegal use of drugs or for on-duty impairment by alcohol; and remove from safety-sensitive positions persons who test positive for illegal use of drugs or on-duty impairment by alcohol pursuant to paragraph (b)(1) of this section.

(3) Any information regarding the medical condition or history of any employee or applicant obtained from a test to determine the illegal use of drugs, except information regarding the illegal use of drugs, is subject to the requirements of § 60-741.23(b)(5) and (c).

#### **§ 60-741.25 Health insurance, life insurance, and other benefit plans.**

(a) An insurer, hospital, or medical service company, health maintenance organization, or any agent or entity that administers benefit plans, or similar organizations may underwrite risks, classify risks, or administer such risks that are based on or not

inconsistent with State law.

(b) The contractor may establish, sponsor, observe, or administer the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law.

(c) The contractor may establish, sponsor, observe, or administer the terms of a bona fide benefit plan that is not subject to State laws that regulate insurance.

(d) The contractor may not deny an individual with a disability equal access to insurance or subject an individual with a disability to different terms or conditions of insurance based on disability alone, if the disability does not pose increased risks.

(e) The activities described in paragraphs (a), (b), and (c) of this section are permitted unless these activities are used as a subterfuge to evade the purposes of this part.

### **Subpart C-Affirmative Action Program**

#### **§ 60-741.40 General purpose and applicability of the affirmative action program requirement.**

(a) General purpose. An affirmative action program is a management tool designed to ensure equal employment opportunity and foster employment opportunities for individuals with disabilities. An affirmative action program institutionalizes the contractor's commitment to equality in every aspect of employment and is more than a paperwork exercise. An affirmative action program is dynamic in nature and includes measurable objectives, quantitative analyses, and internal auditing and reporting systems that measure the contractor's progress toward achieving equal employment opportunity for individuals with disabilities.

(b) Applicability of the affirmative action program. (1) The requirements of this subpart apply to every Government contractor that has 50 or more employees and a contract of \$50,000 or more.

(2) Contractors described in paragraph (b)(1) of this section shall, within 120 days of the commencement of a contract, prepare and maintain an affirmative action program at each establishment. The affirmative action program shall set forth the contractor's policies and procedures in accordance with this part. This program may be integrated into or kept separate from other affirmative action programs.

(3) The affirmative action program shall be reviewed and updated annually by the official designated by the contractor pursuant to §60-741.44(i).

(c) Submission of program to OFCCP. The contractor shall submit the affirmative action program within 30 days of a request from OFCCP, unless the request provides for a different time. The contractor also shall make the affirmative action program promptly available on-site upon OFCCP's request.

#### **§ 60-741.41 Availability of affirmative action program.**

The full affirmative action program, absent the data metrics required by § 60-741.44(k), shall be available to any employee or applicant for employment for inspection upon request. The location and hours during which the program may be obtained shall be posted at each establishment.

#### **§ 60-741.42 Invitation to self-identify.**

(a) Pre-offer. (1) As part of the contractor's affirmative action obligation, the contractor shall invite applicants to inform the contractor whether the applicant believes that he or she is an individual with a disability as defined in § 60-741.2(g)(1)(i) or (ii). This invitation shall be provided to each applicant when the applicant applies or is considered for employment. The invitation may be included with the application materials for a position, but must be separate from the application.

(2) The contractor shall invite an applicant to self-identify as required in paragraph (a) of this section using the language and manner prescribed by the Director and published on the OFCCP Web site.

(b) Post-offer. (1) At any time after the offer of employment, but before the applicant begins his or her job duties, the contractor shall invite the applicant to inform the contractor whether the applicant believes that he or she is an individual with a disability as defined in § 60-741.2(g)(1)(i) or (ii).

(2) The contractor shall invite an applicant to self-identify as required in paragraph (b) of this section using the language and manner prescribed by the Director and published on the OFCCP Web site.

(c) Employees. The contractor shall invite each of its employees to voluntarily inform the contractor whether the employee believes that he or she is an individual with a disability as defined in § 60-741.2(g)(1)(i) or (ii). This invitation shall be extended the first year the contractor becomes subject to the requirements of this section and at five year intervals, thereafter, using the language and manner prescribed by the Director and published on the OFCCP Web site. At least once during the intervening years between these invitations, the contractor must remind their employees that they may voluntarily

update their disability status.

(d) The contractor may not compel or coerce an individual to self-identify as an individual with a disability.

(e) The contractor shall keep all information on self-identification confidential, and shall maintain it in a data analysis file (rather than in the medical files of individual employees). See § 60-741.23(d). The contractor shall provide self-identification information to OFCCP upon request. Self-identification information may be used only in accordance with this part.

(f) Nothing in this section shall relieve the contractor of its obligation to take affirmative action with respect to those applicants or employees of whose disability the contractor has knowledge.

(g) Nothing in this section shall relieve the contractor from liability for discrimination in violation of section 503 or this part.

#### **§ 60-741.43 Affirmative action policy.**

Under the affirmative action obligations imposed by the act, contractors shall not discriminate because of physical or mental disability and shall take affirmative action to employ and advance in employment qualified individuals with disabilities at all levels of employment, including the executive level. Such action shall apply to all employment activities set forth in § 60-741.20.

#### **§ 60-741.44 Required contents of affirmative action programs.**

Acceptable affirmative action programs shall contain, but not necessarily be limited to

the following elements:

(a) Policy statement. The contractor shall include an equal opportunity policy statement in its affirmative action program, and shall post the policy statement on company bulletin boards. The contractor must ensure that applicants and employees with disabilities are provided the notice in a form that is accessible and understandable to the individual with a disability (e.g., providing Braille or large print versions of the notice, or posting a copy of the notice at a lower height for easy viewing by a person using a wheelchair). The policy statement shall indicate the top United States executive's (such as the Chief Executive Officer or the President of the United States Division of a foreign company) support for the contractor's affirmative action program, provide for an audit and reporting system (see paragraph (h) of this section) and assign overall responsibility for the implementation of affirmative action activities required under this part (see paragraph (i) of this section). Additionally, the policy shall state, among other things that the contractor will: recruit, hire, train, and promote persons in all job titles, and ensure that all other personnel actions are administered without regard to disability; and ensure that all employment decisions are based only on valid job requirements. The policy shall state that employees and applicants shall not be subjected to harassment, intimidation, threats, coercion, or discrimination because they have engaged in or may engage in any of the following activities:

- (1) Filing a complaint;
- (2) Assisting or participating in an investigation, compliance evaluation, hearing, or any other activity related to the administration of section 503 or any other Federal, State, or local law requiring equal opportunity for individuals with disabilities;



(3) Opposing any act or practice made unlawful by section 503 or its implementing regulations in this part, or any other Federal, State or local law requiring equal opportunity for individuals with disabilities; or

(4) Exercising any other right protected by section 503 or its implementing regulations in this part.

(b) Review of personnel processes. The contractor shall ensure that its personnel processes provide for careful, thorough, and systematic consideration of the job qualifications of applicants and employees with known disabilities for job vacancies filled either by hiring or promotion, and for all training opportunities offered or available. The contractor shall ensure that its personnel processes do not stereotype individuals with disabilities in a manner which limits their access to all jobs for which they are qualified. In addition, the contractor shall ensure that applicants and employees with disabilities have equal access to its personnel processes, including those implemented through information and communication technologies. The contractor is required to provide necessary reasonable accommodation to ensure applicants and employees with disabilities receive equal opportunity in the operation of personnel processes. The contractor is also encouraged to make its information and communication technologies accessible, even absent a specific request for reasonable accommodation.<sup>3</sup> The contractor

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<sup>3</sup> Contractors are encouraged to make their information and communication technology accessible. There are a variety of resources that may assist contractors in assessing and ensuring the accessibility of its information and communication technology. These include the Web Content Accessibility Guidelines (WCAG 2.0) of the World Wide Web Consortium Web Accessibility Initiative, online at [www.w3.org/WAI/intro/wcag.php](http://www.w3.org/WAI/intro/wcag.php), and the regulations implementing the accessibility requirements for Federal agencies prescribed in section 508 of the Rehabilitation Act. Information on section 508 may be found online at <http://www.section508.gov/index.cfm>. This web site also provides information about various State accessibility requirements and initiatives.

shall periodically review such processes and make any necessary modifications to ensure that these obligations are carried out. A description of the review and any necessary modifications to personnel processes or development of new processes shall be included in any affirmative action programs required under this part. The contractor must design procedures that facilitate a review of the implementation of this requirement by the contractor and the Government.

(c) Physical and mental qualifications. (1) The contractor shall provide in its affirmative action program, and shall adhere to, a schedule for the review of all physical and mental job qualification standards to ensure that, to the extent qualification standards tend to screen out qualified individuals with disabilities, they are job-related for the position in question and are consistent with business necessity.

(2) Whenever the contractor applies physical or mental qualification standards in the selection of applicants or employees for employment or other change in employment status such as promotion, demotion or training, to the extent that qualification standards tend to screen out qualified individuals on the basis of disability, the standards shall be related to the specific job or jobs for which the individual is being considered and consistent with business necessity. The contractor shall have the burden to demonstrate that it has complied with the requirements of this paragraph (c).

(3) The contractor may use as a defense to an allegation of a violation of paragraph (c)(2) of this section that an individual poses a direct threat to the health or safety of the individual or others in the workplace. (See § 60-741.2(e) defining direct threat.)

(d) Reasonable accommodation to physical and mental limitations. (1) As is provided in § 60-741.21(a)(6), as a matter of nondiscrimination, the contractor must make reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability unless it can demonstrate that the accommodation would impose an undue hardship on the operation of its business. As a matter of affirmative action, if an employee with a known disability is having significant difficulty performing his or her job and it is reasonable to conclude that the performance problem may be related to the known disability, the contractor shall confidentially notify the employee of the performance problem and inquire whether the problem is related to the employee's disability. If the employee responds affirmatively, the contractor shall confidentially inquire whether the employee is in need of a reasonable accommodation.

(2) Reasonable accommodation procedures. The development and use of written procedures for processing requests for reasonable accommodation is a best practice that may assist the contractor in meeting its reasonable accommodation obligations under section 503 and this part. Such procedures help ensure that applicants and employees are informed as to how to request a reasonable accommodation and are aware of how such a request will be processed by the contractor. They also help ensure that the contractor's supervisors and managers know what to do should they receive a request for reasonable accommodation, and that all requests for accommodation are processed swiftly, within a reasonable period of time. The development and use of written reasonable accommodation procedures is not required by this part, and it is not a violation of this part for a contractor not to have or use such procedures. However, Appendix B of this part provides guidance to contractors that choose to develop and use written reasonable

accommodation procedures.

(e) Harassment. The contractor must develop and implement procedures to ensure that its employees are not harassed on the basis of disability.

(f) External dissemination of policy, outreach, and positive recruitment -- (1)

Required outreach efforts. (i) The contractor shall undertake appropriate outreach and positive recruitment activities such as those listed in paragraph (f)(2) of this section that are reasonably designed to effectively recruit qualified individuals with disabilities. It is not contemplated that the contractor will necessarily undertake all the activities listed in paragraph (f)(2) of this section or that its activities will be limited to those listed. The scope of the contractor's efforts shall depend upon all the circumstances, including the contractor's size and resources and the extent to which existing employment practices are adequate.

(ii) The contractor must send written notification of company policy related to its affirmative action efforts to all subcontractors, including subcontracting vendors and suppliers, requesting appropriate action on their part.

(2) Examples of outreach and recruitment activities. Below are examples of outreach and positive recruitment activities referred to in paragraph (f)(1) of this section.

(i) Enlisting the assistance and support of the following persons and organizations in recruiting, and developing on-the-job training opportunities for individuals with disabilities, in order to fulfill its commitment to provide equal employment opportunity for such individuals:

(A) The State Vocational Rehabilitation Service Agency (SVRA), State mental health agency, or State developmental disability agency in the area of the contractor's

establishment;

(B) The Employment One-Stop Career Center (One-Stop) or American Job Center nearest the contractor's establishment;

(C) The Department of Veterans Affairs Regional Office nearest the contractor's establishment ([www.va.gov](http://www.va.gov));

(D) Entities funded by the Department of Labor that provide recruitment or training services for individuals with disabilities, such as the services currently provided through the Employer Assistance and Resource Network (EARN) ([www.earnworks.com](http://www.earnworks.com));

(E) Local Employment Network (EN) organizations (other than the contractor, if the contractor is an EN) listed in the Social Security Administration's Ticket to Work Employment Network Directory ([www.yourtickettowork.com/endir](http://www.yourtickettowork.com/endir));

(F) Local disability groups, organizations, or Centers for Independent Living (CIL) near the contractor's establishment;

(G) Placement or career offices of educational institutions that specialize in the placement of individuals with disabilities; and

(H) Private recruitment sources, such as professional organizations or employment placement services that specialize in the placement of individuals with disabilities.

(ii) The contractor should also consider taking the actions listed below to fulfill its commitment to provide equal employment opportunities to individuals with disabilities:

(A) Formal briefing sessions should be held, preferably on company premises, with representatives from recruiting sources. Contractor facility tours, clear and concise explanations of current and future job openings, position descriptions, worker specifications, explanations of the company's selection process, and recruiting literature

should be an integral part of the briefing. At any such briefing sessions, the company official in charge of the contractor's affirmative action program should be in attendance when possible. Formal arrangements should be made for referral of applicants, follow up with sources, and feedback on disposition of applicants.

(B) The contractor's recruitment efforts at all educational institutions should incorporate special efforts to reach students who are individuals with disabilities.

(C) An effort should be made to participate in work-study programs for students, trainees, or interns with disabilities. Such programs may be found through outreach to State and local schools and universities, and through EARN.

(D) Individuals with disabilities should be made available for participation in career days, youth motivation programs, and related activities in their communities.

(E) The contractor should take any other positive steps it deems necessary to attract individuals with disabilities not currently in the work force who have requisite skills and can be recruited through affirmative action measures. These individuals may be located through State and local agencies supported by the U.S. Department of Education's Rehabilitation Services Administration (RSA) (<http://rsa.ed.gov/>), local Ticket-to-Work Employment Networks, or local chapters of groups or organizations that provide services for individuals with disabilities.

(F) The contractor, in making hiring decisions, should consider applicants who are known to have disabilities for all available positions for which they may be qualified when the position(s) applied for is unavailable.

(3) Assessment of external outreach and recruitment efforts. The contractor shall, on an annual basis, review the outreach and recruitment efforts it has taken over the previous

twelve months to evaluate their effectiveness in identifying and recruiting qualified individuals with disabilities. The contractor shall document each evaluation, including at a minimum the criteria it used to evaluate the effectiveness of each effort and the contractor's conclusion as to whether each effort was effective. Among these criteria shall be the data collected pursuant to paragraph (k) of this section for the current year and the two most recent previous years. The contractor's conclusion as to the effectiveness of its outreach efforts must be reasonable as determined by OFCCP in light of these regulations. If the contractor concludes the totality of its efforts were not effective in identifying and recruiting qualified individuals with disabilities, it shall identify and implement alternative efforts listed in paragraphs (f)(1) or (f)(2) of this section in order to fulfill its obligations.

(4) Recordkeeping obligation. The contractor shall document all activities it undertakes to comply with the obligations of this section, and retain these documents for a period of three (3) years.

(g) Internal dissemination of policy. (1) A strong outreach program will be ineffective without adequate internal support from supervisory and management personnel and other employees. In order to assure greater employee cooperation and participation in the contractor's efforts, the contractor shall develop the internal procedures listed in paragraph (g)(2) of this section for communication of its obligation to engage in affirmative action efforts to employ and advance in employment qualified individuals with disabilities. It is not contemplated that the contractor's activities will be limited to those listed. These procedures shall be designed to foster understanding, acceptance and support among the contractor's executive, management, supervisory, and other employees

and to encourage such persons to take the necessary actions to aid the contractor in meeting this obligation.

(2) The contractor shall implement and disseminate this policy internally as follows:

(i) Include it in the contractor's policy manual or otherwise make the policy available to employees;

(ii) If the contractor is a party to a collective bargaining agreement, it shall notify union officials and/or employee representatives of the contractor's policy and request their cooperation;

(3) The contractor is encouraged to additionally implement and disseminate this policy internally as follows:

(i) Inform all employees and prospective employees of its commitment to engage in affirmative action to increase employment opportunities for individuals with disabilities.

The contractor should periodically schedule special meetings with all employees to discuss policy and explain individual employee responsibilities;

(ii) Publicize it in the company newspaper, magazine, annual report and other media;

(iii) Conduct special meetings with executive, management, and supervisory personnel to explain the intent of the policy and individual responsibility for effective implementation making clear the chief executive officer's support for the affirmative action policy;

(iv) Discuss the policy thoroughly in both employee orientation and management training programs;

(v) Include articles on accomplishments of individuals with disabilities in company publications; and



(vi) When employees are featured in employee handbooks or similar publications for employees, include individuals with disabilities.

(h) Audit and reporting system. (1) The contractor shall design and implement an audit and reporting system that will:

- (i) Measure the effectiveness of the contractor's affirmative action program;
- (ii) Indicate any need for remedial action;
- (iii) Determine the degree to which the contractor's objectives have been attained;
- (iv) Determine whether known individuals with disabilities have had the opportunity to participate in all company sponsored educational, training, recreational, and social activities;

(v) Measure the contractor's compliance with the affirmative action program's specific obligations; and

(vi) Document the actions taken to comply with the obligations of paragraphs (h)(1)(i) through (v) of this section, and retain these documents as employment records subject to the recordkeeping requirements of § 60-741.80.

(2) Where the affirmative action program is found to be deficient, the contractor shall undertake necessary action to bring the program into compliance.

(i) Responsibility for implementation. An official of the contractor shall be assigned responsibility for implementation of the contractor's affirmative action activities under this part. His or her identity should appear on all internal and external communications regarding the company's affirmative action program. This official shall be given necessary senior management support and staff to manage the implementation of this program.

(j) Training. All personnel involved in the recruitment, screening, selection, promotion, disciplinary, and related processes shall be trained to ensure that the commitments in the contractor's affirmative action program are implemented.

(k) Data collection analysis. The contractor shall document the following computations or comparisons pertaining to applicants and hires on an annual basis and maintain them for a period of three (3) years:

(1) The number of applicants who self-identified as individuals with disabilities pursuant to § 60-741.42(a), or who are otherwise known to be individuals with disabilities;

(2) The total number of job openings and total number of jobs filled;

(3) The total number of applicants for all jobs;

(4) The number of applicants with disabilities hired; and

(5) The total number of applicants hired.

#### **§ 60-741.45 Utilization goals.**

The utilization goal is not a rigid and inflexible quota which must be met, nor is it to be considered either a ceiling or a floor for the employment of particular groups. Quotas are expressly forbidden.

(a) Goal. OFCCP has established a utilization goal of 7 percent for employment of qualified individuals with disabilities for each job group in the contractor's workforce, or for the contractor's entire workforce as provided in paragraph (d)(2)(i) of this section.

(b) Purpose. The purpose of the utilization goal is to establish a benchmark against which the contractor must measure the representation of individuals within each job

group in its workforce, or within the contractor's entire workforce as provided in paragraph (d)(2)(i) of this section. The utilization goal serves as an equal employment opportunity objective that should be attainable by complying with all aspects of the affirmative action requirements of this part.

(c) Periodic review of goal. The Director of OFCCP shall periodically review and update, as appropriate, the utilization goal established in paragraph (a) of this section.

(d) Utilization analysis--(1) Purpose. The utilization analysis is designed to evaluate the representation of individuals with disabilities in each job group within the contractor's workforce, or to evaluate the representation of individuals with disabilities in the contractor's entire workforce as provided in paragraph (d)(2)(i) of this section, with the utilization goal established in paragraph (a) of this section.

(2) Grouping jobs for analysis. The contractor must use the same job groups established for utilization analyses under Executive Order 11246, either in accordance with 41 CFR part 60-2, or in accordance with 41 CFR part 60-4, as appropriate, except as provided below.

(i) Contractors with 100 or fewer employees. If a contractor has a total workforce of 100 or fewer employees, it need not use the jobs groups established for utilization analyses under Executive Order 11246, and has the option to measure the representation of individuals with disabilities in its entire workforce with the utilization goal established in paragraph (a) of this section.

(ii) [Reserved]

(3) Annual evaluation. The contractor shall annually evaluate its utilization of individuals with disabilities in each job group, or in its entire workforce as provided in

paragraph (d)(2)(i) of this section.

(e) Identification of problem areas. When the percentage of individuals with disabilities in one or more job groups, or in a contractor's entire workforce as provided in paragraph (d)(2)(i) of this section, is less than the utilization goal established in paragraph (a) of this section, the contractor must take steps to determine whether and where impediments to equal employment opportunity exist. When making this determination, the contractor must assess its personnel processes, the effectiveness of its outreach and recruitment efforts, the results of its affirmative action program audit, and any other areas that might affect the success of the affirmative action program.

(f) Action-oriented programs. The contractor must develop and execute action-oriented programs designed to correct any identified problems areas. These action-oriented programs may include the modification of personnel processes to ensure equal employment opportunity for individuals with disabilities, alternative or additional outreach and recruitment efforts from among those listed in § 60-741.44 (f)(1) and (f)(2), and/or other actions designed to correct the identified problem areas and attain the established goal.

(g) A contractor's determination that it has not attained the utilization goal established in paragraph (a) of this section in one or more job groups does not constitute either a finding or admission of discrimination in violation of this part.

(h) The utilization goal established in paragraph (a) of this section shall not be used as a quota or ceiling that limits or restricts the employment of individuals with disabilities.

**§ 60-741.46 Voluntary affirmative action programs for employees with disabilities.**

(a) The contractor is permitted to develop and implement training and employment for employees with disabilities. Examples include, developing a job training program focused on the specific needs of individuals with certain disabilities such as traumatic brain injury (TBI) or developmental disabilities and utilizing linkage agreements to recruit program trainees. Successful programs such as these have been developed by some contractors and OFCCP desires to make clear they are permissible, though not required.

(1) If a contractor elects to implement a voluntary affirmative action program for employees with disabilities, a description of the program and the policies governing the program, including the name and title of the official responsible for the program, shall be included in the contractor's written affirmative action program. An annual report describing the contractor's activities pursuant to the program and identifying the outcomes achieved should also be included in the contractor's affirmative action program.

(2) Disability-related information from the applicant and/or employee self-identification request required by § 60-741.42 may be used to identify individuals with disabilities who are eligible to benefit from a voluntary affirmative action program for employees with disabilities.

(b) The contractor shall not use such programs to segregate individuals with disabilities or to limit or restrict the employment opportunities of any individual with a disability.

(c) The contractor shall not discriminate against an individual with a disability who has participated in a voluntary affirmative action program for employees with disabilities with respect to any term, condition, or benefit of employment, including, but not limited

to, employment acts such as compensation, promotion, and termination, that are listed in § 60-741.20.

(d) These voluntary training and development programs should not result in discrimination against other groups and do not relieve a contractor from liability for discrimination under this act, Executive Order 11246, or the Vietnam Era Veterans' Readjustment Assistance Act.

#### **§ 60-741.47 Sheltered workshops.**

Contracts with sheltered workshops do not constitute affirmative action in lieu of employment and advancement of qualified individuals with disabilities in the contractor's own work force. Contracts with sheltered workshops may be included within an affirmative action program if the sheltered workshop trains employees for the contractor and the contractor is obligated to hire trainees at full compensation when such trainees become "qualified individuals with disabilities."

### **Subpart D – General Enforcement and Complaint Procedures**

#### **§ 60-741.60 Compliance evaluations.**

(a) OFCCP may conduct compliance evaluations to determine if the contractor is taking affirmative action to employ, advance in employment, and otherwise treat qualified individuals without discrimination on the basis of disability in all employment practices. A compliance evaluation may consist of any one or any combination of the following investigative procedures:

(1) Compliance review. A comprehensive analysis and evaluation of the hiring and

employment practices of the contractor, the written affirmative action program, and the results of the affirmative action efforts undertaken by the contractor. A compliance review may proceed in three stages:

(i) A desk audit of the written affirmative action program and supporting documentation to determine whether all elements required by the regulations in this part are included, whether the affirmative action program meets agency standards of reasonableness, and whether the affirmative action program and supporting documentation satisfy agency standards of acceptability. OFCCP may extend the temporal scope of the desk audit beyond that set forth in the scheduling letter if OFCCP deems it necessary to carry out its investigation of potential violations of this part. The desk audit is conducted at OFCCP offices;

(ii) An on-site review is conducted at the contractor's establishment to investigate unresolved problem areas identified in the affirmative action program and supporting documentation during the desk audit, to verify that the contractor has implemented the affirmative action program and has complied with those regulatory obligations not required to be included in the affirmative action program, and to examine potential instances or issues of discrimination. An on-site review normally will involve an examination of the contractor's personnel and employment policies, inspection and copying of documents related to employment actions, and interviews with employees, supervisors, managers, hiring officials; and

(iii) Where necessary, an off-site analysis of information supplied by the contractor or otherwise gathered during or pursuant to the on-site review;

(2) Off-site review of records. An analysis and evaluation of the affirmative action

program (or any part thereof) and supporting documentation, and other documents related to the contractor's personnel policies and employment actions that may be relevant to a determination of whether the contractor has complied with the requirements of section 503 and its regulations;

(3) Compliance check. A determination of whether the contractor has maintained records consistent with § 60-741.80; OFCCP may request the documents be provided either on-site or off-site; or

(4) Focused review. A review restricted to one or more components of the contractor's organization or one or more aspects of the contractor's employment practices.

(b) Where deficiencies are found to exist, reasonable efforts shall be made to secure compliance through conciliation and persuasion pursuant to § 60-741.62.

(c) Pre-award compliance evaluations. Each agency will include in the invitation for bids for each formally advertised nonconstruction contract or state at the outset of negotiations for each negotiated contract, that if the award, when let, should total \$10 million or more, the prospective contractor and its known first-tier subcontractors with subcontracts of \$10 million or more will be subject to a compliance evaluation before the award of the contract unless OFCCP has conducted an evaluation and found them to be in compliance with section 503 within the preceding 24 months. The awarding agency will notify OFCCP and request appropriate action and findings in accordance with this subsection. Within 15 days of the notice, OFCCP will inform the awarding agency of its intention to conduct a pre-award compliance evaluation. If OFCCP does not inform the awarding agency within that period of its intention to conduct a pre-award compliance evaluation, clearance shall be presumed and the awarding agency is authorized to proceed



with the award. If OFCCP informs the awarding agency of its intention to conduct a pre-award compliance evaluation, OFCCP will be allowed an additional 20 days after the date that it so informs the awarding agency to provide its conclusions. If OFCCP does not provide the awarding agency with its conclusions within that period, clearance will be presumed and the awarding agency is authorized to proceed with the award.

**§ 60-741.61 Complaint procedures.**

(a) Coordination with other agencies. Pursuant to section 107(b) of the Americans with Disabilities Act of 1990, as amended (ADA), OFCCP and the Equal Employment Opportunity Commission (EEOC) have promulgated regulations setting forth procedures governing the processing of complaints falling within the overlapping jurisdiction of both the act and title I of the ADA to ensure that such complaints are dealt with in a manner that avoids duplication of effort and prevents the imposition of inconsistent or conflicting standards. Complaints filed under this part will be processed in accordance with those regulations, which are found at 41 CFR part 60-742, and with this part.

(b) Place and time of filing. Any applicant for employment with a contractor or any employee of a contractor may, personally, or by an authorized representative, file a written complaint with the Director alleging a violation of the act or the regulations in this part. The complaint may allege individual or class-wide violation(s). Complaints may be submitted to the OFCCP, 200 Constitution Avenue, N.W., Room C-3325, Washington, D.C. 20210, or to any OFCCP regional, district, or area office. Such complaint must be filed within 300 days of the date of the alleged violation, unless the time for filing is extended by OFCCP for good cause shown.

(c) Contents of complaints. (1) In general. A complaint must be signed by the complainant or his or her authorized representative and must contain the following information:

- (i) Name and address (including telephone number) of the complainant;
- (ii) Name and address of the contractor who committed the alleged violation;
- (iii) The facts showing that the individual has a disability, a record or history of a disability, or was regarded by the contractor as having a disability;
- (iv) A description of the act or acts considered to be a violation, including the pertinent dates (in the case of an alleged continuing violation, the earliest and most recent date that the alleged violation occurred should be stated); and
- (v) Other pertinent information available which will assist in the investigation and resolution of the complaint, including the name of any known Federal agency with which the employer has contracted.

(2) Third party complaints. When a written complaint is filed by an authorized representative, that complaint need not identify by name the person on whose behalf it is filed. However, the authorized representative must nonetheless provide the name, address and telephone number of the person on whose behalf the complaint is filed to OFCCP, along with the other information specified in paragraph (c)(1) of this section. OFCCP shall verify the authorization of such complaint with the person on whose behalf the complaint is filed. Any such person may request that OFCCP keep his or her identity confidential during the investigation of the complaint, and OFCCP will protect the individual's confidentiality wherever that is possible given the facts and circumstances in the complaint.

(d) Incomplete information. Where a complaint contains incomplete information, OFCCP shall seek the needed information from the complainant. If the information is not furnished to OFCCP within 60 days of the date of such request, the case may be closed.

(e) Investigations. The Department of Labor shall institute a prompt investigation of each complaint.

(f) Resolution of matters. (1) If the complaint investigation finds no violation of the act or this part, or if the Director decides not to refer the matter to the Solicitor of Labor for enforcement proceedings against the contractor pursuant to § 60-741.65(a)(l), the complainant and contractor shall be so notified. The Director, on his or her own initiative, may reconsider his or her determination or the determination of any of his or her designated officers who have authority to issue Notifications of Results of Investigation.

(2) The Director will review all determinations of no violation that involve complaints that are not also cognizable under title I of the Americans with Disabilities Act.

(3) In cases where the Director decides to reconsider the determination of a Notification of Results of Investigation, the Director shall provide prompt notification of his or her intent to reconsider, which is effective upon issuance, and his or her final determination after reconsideration to the person claiming to be aggrieved, the person making the complaint on behalf of such person, if any, and the contractor.

(4) If the investigation finds a violation of the act or this part, OFCCP shall invite the contractor to participate in conciliation discussions pursuant to § 60-741.62.

**§ 60-741.62 Conciliation agreements.**

(a) If a compliance evaluation, complaint investigation, or other review by OFCCP finds a material violation of the act or this part, and if the contractor is willing to correct the violations and/or deficiencies, and if OFCCP determines that settlement on that basis (rather than referral for consideration of formal enforcement) is appropriate, a written conciliation agreement will be required. The agreement shall provide for such remedial action as may be necessary to correct the violations and/or deficiencies noted, including, where appropriate (but not necessarily limited to) such make whole remedies as back pay and retroactive seniority. The agreement shall also specify the time period for completion of the remedial action; the period shall be no longer than the minimum period necessary to complete the action.

(b) Remedial benchmarks. The remedial action referenced in paragraph (a) of this section may include the establishment of benchmarks for the contractor's outreach, recruitment, hiring, or other employment activities. The purpose of such benchmarks is to create a quantifiable method by which the contractor's progress in correcting identified violations and/or deficiencies can be measured.

#### **§ 60-741.63 Violations of conciliation agreements.**

(a) When OFCCP believes that a conciliation agreement has been violated, the following procedures are applicable:

(1) A written notice shall be sent to the contractor setting forth the violation alleged and summarizing the supporting evidence. The contractor shall have 15 days from receipt of the notice to respond, except in those cases in which OFCCP asserts that such a delay would result in irreparable injury to the employment rights of affected employees or

applicants.

(2) During the 15-day period the contractor may demonstrate in writing that it has not violated its commitments.

(b) In those cases in which OFCCP asserts that a delay would result in irreparable injury to the employment rights of affected employees or applicants, enforcement proceedings may be initiated immediately without proceeding through any other requirement contained in this chapter.

(c) In any proceedings involving an alleged violation of a conciliation agreement, OFCCP may seek enforcement of the agreement itself and shall not be required to present proof of the underlying violations resolved by the agreement.

#### **§ 60-741.64 Show cause notices.**

When the Director has reasonable cause to believe that the contractor has violated the act or this part, he or she may issue a notice requiring the contractor to show cause, within 30 days, why monitoring, enforcement proceedings, or other appropriate action to ensure compliance should not be instituted. The issuance of such a notice is not a prerequisite to instituting enforcement proceedings (see § 60-741.65).

#### **§ 60-741.65 Enforcement proceedings.**

(a) General. (1) If a compliance evaluation, complaint investigation, or other review by OFCCP finds a violation of the act or this part, and the violation has not been corrected in accordance with the conciliation procedures in this part, or OFCCP determines that referral for consideration of formal enforcement (rather than settlement) is appropriate,

OFCCP may refer the matter to the Solicitor of Labor with a recommendation for the institution of enforcement proceedings to enjoin the violations, to seek appropriate relief, and to impose appropriate sanctions, or any combination of these outcomes. OFCCP may seek back pay and other make whole relief for aggrieved individuals identified during a complaint investigation or compliance review. Such individuals need not have filed a complaint as a prerequisite to OFCCP seeking such relief on their behalf. Interest on back pay shall be calculated from the date of the loss and compounded quarterly at the percentage rate established by the Internal Revenue Service (IRS) for the underpayment of taxes.

(2) In addition to the administrative proceedings set forth in this section, the Director may, within the limitations of applicable law, seek appropriate judicial action to enforce the contractual provisions set forth in § 60-741.5, including appropriate injunctive relief.

(b) Hearing practice and procedure. (1) In administrative enforcement proceedings the contractor shall be provided an opportunity for a formal hearing. All hearings conducted under the act and this part shall be governed by the Rules of Practice for Administrative Proceedings to Enforce Equal Opportunity Under Executive Order 11246 contained in 41 CFR part 60-30 and the Rules of Evidence set out in the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges contained in 29 CFR part 18, subpart B: Provided, That a final administrative order shall be issued within one year from the date of the issuance of the recommended findings, conclusions, and decision of the Administrative Law Judge, or the submission of any exceptions and responses to exceptions to such decision (if any) whichever is later.

(2) Complaints may be filed by the Solicitor, the Associate Solicitor for Civil Rights

and Labor-Management, Regional Solicitors and Associate Regional Solicitors.

(3) For the purposes of hearings pursuant to this part, references in 41 CFR part 60-30 to “Executive Order 11246” shall mean section 503 of the Rehabilitation Act of 1973, as amended; references to “equal opportunity clause” shall mean the equal opportunity clause published at § 60-741.5; and references to “regulations” shall mean the regulations contained in this part.

#### **§ 60-741.66 Sanctions and penalties.**

(a) Withholding progress payments. With the prior approval of the Director, so much of the accrued payment due on the contract or any other contract between the Government contractor and the Federal Government may be withheld as necessary to correct any violations of the provisions of the act or this part.

(b) Termination. A contract may be canceled or terminated, in whole or in part, for failure to comply with the provisions of the act or this part.

(c) Debarment. A contractor may be debarred from receiving future contracts for failure to comply with the provisions of the act or this part subject to reinstatement pursuant to § 60-741.68. Debarment may be imposed for an indefinite period, or may be imposed for a fixed period of not less than six months, but no more than three years.

(d) Hearing opportunity. An opportunity for a formal hearing shall be afforded to a contractor before the imposition of any sanction or penalty.

#### **§ 60-741.67 Notification of agencies.**

The Director shall ensure that the heads of all agencies are notified of any debarments

taken against any contractor.

**§ 60-741.68 Reinstatement of ineligible contractors.**

(a) Application for reinstatement. A contractor debarred from further contracts for an indefinite period under the act may request reinstatement in a letter filed with the Director at any time after the effective date of the debarment; a contractor debarred for a fixed period may make such a request following the expiration of six months from the effective date of the debarment. In connection with the reinstatement proceedings, all debarred contractors shall be required to show that they have established and will carry out employment policies and practices in compliance with the act and this part. Additionally, in determining whether reinstatement is appropriate for a contractor debarred for a fixed period, the Director also shall consider, among other factors, the severity of the violation which resulted in the debarment, the contractor's attitude towards compliance, the contractor's past compliance history, and whether the contractor's reinstatement would impede the effective enforcement of the act or this part. Before reaching a decision, the Director may conduct a compliance evaluation of the contractor and may require the contractor to supply additional information regarding the request for reinstatement. The Director shall issue a written decision on the request.

(b) Petition for review. Within 30 days of its receipt of a decision denying a request for reinstatement, the contractor may file a petition for review of the decision with the Secretary. The petition shall set forth the grounds for the contractor's objections to the Director's decision. The petition shall be served on the Director and the Associate Solicitor for Civil Rights and Labor-Management and shall include the decision as an



appendix. The Director may file a response within 14 days to the petition. The Secretary shall issue the final agency decision denying or granting the request for reinstatement. Before reaching a final decision, the Secretary may issue such additional orders respecting procedure as he or she finds appropriate in the circumstances, including an order referring the matter to the Office of Administrative Law Judges for an evidentiary hearing where there is a material factual dispute that cannot be resolved on the record before the Secretary.

**§ 60-741.69 Intimidation and interference.**

(a) The contractor shall not harass, intimidate, threaten, coerce, or discriminate against any individual because the individual has engaged in or may engage in any of the following activities:

- (1) Filing a complaint;
  - (2) Assisting or participating in any manner in an investigation, compliance evaluation, hearing, or any other activity related to the administration of the act or any other Federal, State, or local law requiring equal opportunity for individuals with disabilities;
  - (3) Opposing any act or practice made unlawful by the act or this part or any other Federal, State, or local law requiring equal opportunity for individuals with disabilities;
- or
- (4) Exercising any other right protected by the act or this part.

(b) The contractor shall ensure that all persons under its control do not engage in such harassment, intimidation, threats, coercion, or discrimination. The sanctions and penalties contained in this part may be exercised by the Director against any contractor

who violates this obligation.

**§ 60-741.70 Disputed matters related to compliance with the act.**

The procedures set forth in the regulations in this part govern all disputes relative to the contractor's compliance with the act and this part. Any disputes relating to issues other than compliance, including contract costs arising out of the contractor's efforts to comply, shall be determined by the disputes clause of the contract.

**Subpart E-Ancillary Matters**

**§ 60-741.80 Recordkeeping**

(a) General requirements. Except as set forth in paragraph (b) of this section, any personnel or employment record made or kept by the contractor shall be preserved by the contractor for a period of two years from the date of the making of the record or the personnel action involved, whichever occurs later. However, if the contractor has fewer than 150 employees or does not have a Government contract of at least \$150,000, the minimum record retention period shall be one year from the date of the making of the record or the personnel action involved, whichever occurs later, except as set forth in paragraph (b) of this section. Such records include, but are not necessarily limited to, records relating to requests for reasonable accommodation; the results of any physical examination; job advertisements and postings; applications and resumes; tests and test results; interview notes; and other records having to do with hiring, assignment, promotion, demotion, transfer, lay-off or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship. In the case of involuntary

termination of an employee, the personnel records of the individual terminated shall be kept for a period of two years from the date of the termination, except that contractors that have fewer than 150 employees or that do not have a Government contract of at least \$150,000 shall keep such records for a period of one year from the date of the termination. Where the contractor has received notice that a complaint of discrimination has been filed, that a compliance evaluation has been initiated, or that an enforcement action has been commenced, the contractor must preserve all personnel records relevant to the complaint, compliance evaluation, or action until final disposition of the complaint, compliance evaluation or action. The term “personnel records relevant to the complaint, compliance evaluation, or action” will include, for example, personnel or employment records relating to the aggrieved person and to all other employees holding positions similar to that held or sought by the aggrieved person and application forms or test papers completed by an unsuccessful applicant and by all other candidates for the same position as that for which the aggrieved person applied and was rejected.

(b) Records with three-year retention requirement. Records required by § 60-741.44(f)(4) and (k) shall be maintained by all contractors for a period of three years from the date of the making of the record.

(c) Failure to preserve records. Failure to preserve complete and accurate records as required by this part constitutes noncompliance with the contractor’s obligations under the act and this part. Where the contractor has destroyed or failed to preserve records as required by this section, there may be a presumption that the information destroyed or not preserved would have been unfavorable to the contractor: Provided, That this

presumption shall not apply where the contractor shows that the destruction or failure to preserve records results from circumstances that are outside of the contractor's control.

**§ 60-741.81 Access to records.**

Each contractor shall permit access during normal business hours to its places of business for the purpose of conducting on-site compliance evaluations and complaint investigations and inspecting and copying such books, accounts, and records, including electronic records, and any other material OFCCP deems relevant to the matter under investigation and pertinent to compliance with the act or this part. Contractors must also provide OFCCP access to these materials, including electronic records, off-site for purposes of conducting compliance evaluations and complaint investigations. Upon request, the contractor must provide OFCCP information about all format(s), including specific electronic formats, in which the contractor maintains its records and other information. The contractor must provide records and other information in any of the formats in which they are maintained, as selected by OFCCP. Information obtained in this manner shall be used only in connection with the administration of the act, the Americans with Disabilities Act of 1990, as amended (ADA), and in furtherance of the purposes of the act and the ADA. OFCCP will treat records provided by the contractor to OFCCP under this section as confidential to the maximum extent the information is exempt from public disclosure under the Freedom of Information Act, 5 U.S.C. 552.

**§ 60-741.82 Labor organizations and recruiting and training agencies.**

(a) Whenever performance in accordance with the equal opportunity clause or any

matter contained in the regulations in this part may necessitate a revision of a collective bargaining agreement, the labor organizations which are parties to such agreement shall be given an adequate opportunity to present their views to OFCCP.

(b) OFCCP shall use its best efforts, directly or through contractors, subcontractors, local officials, vocational rehabilitation facilities, and all other available instrumentalities, to cause any labor organization, recruiting and training agency, or other representative of workers who are employed by a contractor to cooperate with, and to assist in, the implementation of the purposes of the act.

#### **§ 60-741.83 Rulings and interpretations.**

Rulings under or interpretations of the act and this part shall be made by the Director.

#### **Appendix A to Part 60-741--Guidelines on a Contractor's Duty to Provide Reasonable Accommodation**

The guidelines in this appendix are in large part derived from, and are consistent with, the discussion regarding the duty to provide reasonable accommodation contained in the Interpretive Guidance on title I of the Americans with Disabilities Act, as amended (ADA), set out as an appendix to the regulations issued by the Equal Employment Opportunity Commission (EEOC) implementing the ADA (29 CFR part 1630).

Although the following discussion is intended to provide an independent “free-standing” source of guidance with respect to the duty to provide reasonable accommodation under this part, to the extent that the EEOC appendix provides additional guidance which is consistent with the following discussion, it may be relied upon for purposes of this part as

well. See § 60-741.1(c). Contractors are obligated to provide reasonable accommodation and to take affirmative action. Reasonable accommodation under section 503, like reasonable accommodation required under the ADA, is a part of the nondiscrimination obligation. See EEOC appendix cited in this paragraph. Affirmative action is unique to section 503, and includes actions above and beyond those required as a matter of nondiscrimination. An example of this is the requirement discussed in paragraph 2 of this appendix that a contractor shall make an inquiry of an employee with a known disability who is having significant difficulty performing his or her job.

1. A contractor is required to make reasonable accommodations to the known physical or mental limitations of a qualified individual with a disability, unless the contractor can demonstrate that the accommodation would impose an undue hardship on the operation of its business. As stated in § 60-741.2(r), an individual with a disability is qualified if he or she satisfies all the skill, experience, education, and other job-related selection criteria, and can perform the essential functions of the position with or without reasonable accommodation. A contractor is required to make a reasonable accommodation with respect to its application process if the individual with a disability is qualified with respect to that process. One is qualified within the meaning of section 503 if he or she is qualified for a job, except that, because of a disability, he or she needs a reasonable accommodation to be able to perform the job's essential functions.

2. Although the contractor would not be expected to accommodate disabilities of which it is unaware, the contractor has an affirmative obligation to provide reasonable accommodation for applicants and employees of whose disabilities the contractor has actual knowledge. As stated in § 60-741.42, as part of the contractor's affirmative action

obligation, the contractor is required to invite applicants to inform the contractor whether the applicant believes that he or she is an individual with a disability both prior to an offer of employment, and after an offer of employment but before he or she begins his/her employment duties. That invitation also informs applicants of the contractor's reasonable accommodation obligation and invites individuals with disabilities to request any accommodation they might need. Moreover, § 60-741.44(d) provides that if an employee with a known disability is having significant difficulty performing his or her job and it is reasonable to conclude that the performance problem may be related to the disability, the contractor is required to confidentially inquire whether the problem is disability related and if the employee is in need of a reasonable accommodation.

3. An accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities. Equal employment opportunity means an opportunity to attain the same level of performance, or to enjoy the same level of benefits and privileges of employment as are available to the average similarly situated employee without a disability. Thus, for example, an accommodation made to assist an employee with a disability in the performance of his or her job must be adequate to enable the individual to perform the essential functions of the position. The accommodation, however, does not have to be the "best" accommodation possible, so long as it is sufficient to meet the job-related needs of the individual being accommodated. There are three areas in which reasonable accommodations may be necessary: (1) accommodations in the application process; (2) accommodations that enable employees with disabilities to perform the essential functions of the position held or desired; and (3) accommodations that enable employees

with disabilities to enjoy equal benefits and privileges of employment as are enjoyed by employees without disabilities.

4. The term “undue hardship” refers to any accommodation that would be unduly costly, extensive, substantial, or disruptive, or that would fundamentally alter the nature or operation of the contractor’s business. The contractor’s claim that the cost of a particular accommodation will impose an undue hardship requires a determination of which financial resources should be considered--those of the contractor in its entirety or only those of the facility that will be required to provide the accommodation. This inquiry requires an analysis of the financial relationship between the contractor and the facility in order to determine what resources will be available to the facility in providing the accommodation. If the contractor can show that the cost of the accommodation would impose an undue hardship, it would still be required to provide the accommodation if the funding is available from another source (e.g., a State vocational rehabilitation agency) or if Federal, State, or local tax deductions or tax credits are available to offset the cost of the accommodation. In the absence of such funding, the individual with a disability must be given the option of providing the accommodation or of paying that portion of the cost which constitutes the undue hardship on the operation of the business.

5. The definition for “reasonable accommodation” in § 60-741.2(s) lists a number of examples of the most common types of accommodations that the contractor may be required to provide. There are a number of specific accommodations that may be appropriate for particular situations. The discussion in this appendix is not intended to provide an exhaustive list of required accommodations (as no such list would be feasible); rather, it is intended to provide general guidance regarding the nature of the



obligation. The decision as to whether a reasonable accommodation is appropriate must be made on a case-by-case basis. The contractor generally should consult with the individual with a disability in deciding on the appropriate accommodation; frequently, the individual will know exactly what accommodation he or she will need to perform successfully in a particular job, and may suggest an accommodation which is simpler and less expensive than the accommodation the contractor might have devised. Other resources to consult include the appropriate State vocational rehabilitation services agency, the Equal Employment Opportunity Commission (1-800-669-4000 (voice) or 1-800-669-6820 (TTY)), the Job Accommodation Network (JAN) – a service of the U.S. Department of Labor’s Office of Disability Employment Policy (1-800-526-7234 (voice) or 1-877-781-9403 (TTY)), private disability organizations, and other employers.

6. With respect to accommodations that can permit an employee with a disability to perform essential functions successfully, a reasonable accommodation may require the contractor to, for instance, modify or acquire equipment. For those visually-impaired, such accommodations may include providing adaptive hardware and software for computers, electronic visual aids, Braille writers, talking calculators, magnifiers, audio recordings, and Braille or large print materials. For persons with hearing impairments, reasonable accommodations may include providing telephone handset amplifiers, telephones compatible with hearing aids, and TTY machines. For persons with limited physical dexterity, the obligation may require the provision of telephone headsets, mechanical page turners, and raised or lowered furniture.

7. Other reasonable accommodations of this type may include providing personal assistants such as a reader, interpreter, or travel attendant, permitting the use of accrued

paid leave or providing additional unpaid leave for necessary treatment. The contractor may also be required to make existing facilities readily accessible to and usable by individuals with disabilities--including areas used by employees for purposes other than the performance of essential job functions -- such as restrooms, break rooms, cafeterias, lounges, auditoriums, libraries, parking lots, and credit unions. This type of accommodation will enable employees to enjoy equal benefits and privileges of employment as are enjoyed by employees who do not have disabilities.

8. Another of the potential accommodations listed in § 60-741.2(s) is job restructuring. This may involve reallocating or redistributing those nonessential, marginal job functions which a qualified individual with a disability cannot perform to another position. Accordingly, if a clerical employee is occasionally required to lift heavy boxes containing files, but cannot do so because of a disability, this task may be reassigned to another employee. The contractor, however, is not required to reallocate essential functions, i.e., those functions that the individual who holds the job would have to perform, with or without reasonable accommodation, in order to be considered qualified for the position. For instance, the contractor that has a security guard position which requires the incumbent to inspect identity cards would not have to provide a blind individual with an assistant to perform that duty; in such a case, the assistant would be performing an essential function of the job for the individual with a disability. Job restructuring may also involve allowing part-time or modified work schedules. For instance, flexible or adjusted work schedules could benefit individuals with disabilities who cannot work a standard schedule because of the need to obtain medical treatment, or individuals with mobility impairments who depend on a public transportation system that

is not accessible during the hours of a standard schedule.

9. Reasonable accommodation may also include reassignment to a vacant position. In general, reassignment should be considered only when accommodation within the individual's current position would pose an undue hardship. Reassignment is not required for applicants. However, in making hiring decisions, contractors are encouraged to consider known applicants with disabilities for all available positions for which they may be qualified when the position(s) applied for is unavailable. Reassignment may not be used to limit, segregate, or otherwise discriminate against employees with disabilities by forcing reassignments to undesirable positions or to designated offices or facilities. Employers should reassign the individual to an equivalent position in terms of pay, status, etc., if the individual is qualified, and if the position is vacant within a reasonable amount of time. A reasonable amount of time should be determined in light of the totality of the circumstances.

10. The contractor may reassign an individual to a lower graded position if there are no accommodations that would enable the employee to remain in the current position and there are no vacant equivalent positions for which the individual is qualified with or without reasonable accommodation. The contractor may maintain the reassigned individual with a disability at the salary of the higher graded position, and must do so if it maintains the salary of reassigned employees who are not disabled. It should also be noted that the contractor is not required to promote an individual with a disability as an accommodation.

11. With respect to the application process, appropriate accommodations may include the following: (1) providing information regarding job vacancies in a form accessible to

those with vision or hearing impairments (e.g., by making an announcement available in Braille, in large print, or on audio tape, or by responding to job inquiries via TTY); (2) providing readers, interpreters and other similar assistance during the application, testing and interview process; (3) appropriately adjusting or modifying employment-related examinations (e.g., extending regular time deadlines, allowing a blind person or one with a learning disorder such as dyslexia to provide oral answers for a written test, and permitting an applicant, regardless of the nature of his or her disability to demonstrate skills through alternative techniques and utilization of adapted tools, aids and devices); and (4) ensuring an applicant with a mobility impairment full access to testing locations such that the applicant's test scores accurately reflect the applicant's skills or aptitude rather than the applicant's mobility impairment.

#### **Appendix B to Part 60-741- Developing Reasonable Accommodation Procedures**

As stated in §§60-741.21(a)(6) and 60-741.44(d), the development and use of written procedures for processing requests for reasonable accommodation is a best practice. This Appendix provides guidance contractors may wish to use should they decide to adopt this best practice. As stated in the regulations, contractors are not required to use written reasonable accommodation procedures, and the failure to use such procedures will not result in a finding of violation.

1. Designation of responsible official. The contractor should designate an official to be responsible for the implementation of the reasonable accommodation procedures. The responsible official may be the same official who is responsible for the implementation of the contractor's affirmative action program. The responsible official should have the

authority, resources, support, and access to top management that is needed to ensure the effective implementation of the reasonable accommodation procedures. The name, title/office, and contact information (telephone number and email address) of the responsible official should be included in the reasonable accommodation procedures, and should be updated when changes occur.

2. Description of process. The contractor's reasonable accommodation procedures should contain a description of the steps the contractor takes when processing a reasonable accommodation request, including the process by which the contractor renders a final determination on the accommodation request. If specific information must be provided to the contractor in order to obtain a reasonable accommodation, the description should identify this information. For example, the contractor's reasonable accommodation procedures may state that to obtain a reasonable accommodation, the contractor must be informed of the existence of a disability, the disability-related limitation(s) or workplace barrier(s) that needs to be accommodated, and, if known, the desired reasonable accommodation. The description should also indicate that, if the need for accommodation is not obvious, or if additional information is needed, the contractor may initiate an interactive process with the accommodation requester.

3. Form of requests for reasonable accommodation. The reasonable accommodation procedures should specify that a request for reasonable accommodation may be oral or written and should explain that there are no required "magic words" that must be used by the requester to request an accommodation. The procedures should also state that requests for reasonable accommodation may be made by an applicant, employee, or by a third party, such as a relative, job coach, or friend, on his or her behalf.

4. Submission of reasonable accommodation requests by employees. The reasonable accommodation procedures should identify to whom an employee (or a third party acting on his or her behalf) must submit an accommodation request. At a minimum, this should include any supervisor or management official in the employee's chain of command, and the official responsible for the implementation of the reasonable accommodation procedures.

5. Recurring requests for a reasonable accommodation. The reasonable accommodation procedures should provide that in instances of a recurring need for an accommodation (e.g., a hearing impaired employee's need for a sign language interpreter for meetings) the requester will not be required to repeatedly submit or renew their request for accommodation each time the accommodation is needed. In the absence of a reasonable belief that the individual's recurring need for the accommodation has changed, requiring the repeated submission of a request for the accommodation could be considered harassment on the basis of disability in violation of this part.

6. Supporting medical documentation. The reasonable accommodation procedures should explain the circumstances, if any, under which the contractor may request and review medical documentation in support of a request for reasonable accommodation. The procedures should explain that any request for medical documentation may not be open ended, and must be limited to documentation of the individual's disability and the functional limitations for which reasonable accommodation is sought. The procedures should also explain that the submission of medical documentation is not required when the disability for which a reasonable accommodation is sought is known or readily observable and the need for accommodation is known or obvious.

7. Written confirmation of receipt of request. The reasonable accommodation procedures should specify that written confirmation of the receipt of a request for reasonable accommodation will be provided to the requester, either by letter or email. The written confirmation should include the date the accommodation request was received, and be signed by the authorized decisionmaker or his or her designee.

8. Timeframe for processing requests. The reasonable accommodation procedures should state that requests for accommodation will be processed as expeditiously as possible. Oral requests for reasonable accommodation should be considered received on the date they are initially made, even if the contractor has a reasonable accommodation request form that has not been completed. Requests for reasonable accommodation must be processed within a reasonable period of time. What constitutes a reasonable period of time will depend upon the specific circumstances. However, in general, if supporting medical documentation is not needed, that timeframe should not be longer than 5 to 10 business days. If supporting medical documentation is needed, or if special equipment must be ordered, that timeframe should not exceed 30 calendar days, unless there are extenuating circumstances beyond the control of the contractor. The procedures should explain what constitutes extenuating circumstances. However, reasonable accommodations may need to be provided even more expeditiously for applicants. See the discussion of accommodation requests from applicants in section 10, below.

9. Delay in responding to request. If the contractor's processing of an accommodation request will exceed established timeframes, written notice should be provided to the requester. The notice should include the reason(s) for the delay and a projected date of response. The notice should also be dated and signed by the authorized decisionmaker or

his or her designee.

10. Reasonable accommodation requests by applicants. The reasonable accommodation procedures should include procedures to ensure that all applicants, including those using the contractor's online or other electronic application system, are made aware of the contractor's reasonable accommodation obligation and are invited to request any reasonable accommodation needed to participate fully in the application process. All applicants should also be provided with contact information for contractor staff able to assist the applicant, or his or her representative, in making a request for accommodation. The contractor's procedures should provide that reasonable accommodation requests by or on behalf of an applicant are processed expeditiously, using timeframes tailored to the application process.

11. Denial of reasonable accommodation. The contractor's reasonable accommodation procedures should specify that any denial or refusal to provide a requested reasonable accommodation will be provided in writing. The written denial should include the reason for the denial and be dated and signed by the authorized decisionmaker or his or her designee. If the contractor provides an internal appeal or reconsideration process, the written denial should inform the requester about this process.

12. Confidentiality. The contractor's reasonable accommodation procedures should indicate that all requests for reasonable accommodation, related documentation (such as request confirmation receipts, requests for additional information, and decisions regarding accommodation requests), and any medical or disability-related information provided to the contractor will be treated as confidential medical records and maintained in a separate medical file, in accordance with section 503 and this part.



13. Dissemination of procedures to employees. The contractor should disseminate its written reasonable accommodation procedures to all employees. Notice of the reasonable accommodation procedures may be provided by their inclusion in an employee handbook that is disseminated to all employees and/or by email or electronic posting on a company webpage where work-related notices are ordinarily posted. Notice of the reasonable accommodation procedures should be provided to employees who work off-site in the same manner that notice of other work-related matters is ordinarily provided to these employees.

14. Training. The contractor should provide annual training for its supervisors and managers regarding the implementation of the reasonable accommodation procedures. Training should also be provided whenever significant changes are made to the reasonable accommodation procedures. Training regarding the reasonable accommodation procedures may be provided in conjunction with other required equal employment opportunity or affirmative action training.

[FR Doc. 2013-21228 Filed 09/23/2013 at 8:45 am; Publication Date: 09/24/2013]